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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 84

W. L. MATHEWS ET AL., APPELLANTS,

vs.

J. F. RODGERS ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF MISSISSIPPI

FILED MAY 15, 1931

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 29, 1931

[fol. 1]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DELTA DIVISION OF THE NORTHERN DISTRICT OF MISSISSIPPI

J. F. RODGERS et al.

vs.

W. L. MATTHEWS et al.

BILL OF COMPLAINT—Filed Sept. 20, 1930

To the Honorable Allen Cox, Judge of the Court aforesaid:

Plaintiffs, as grounds for relief in this court, state the facts following, to-wit:

I

The names and residences of the several plaintiffs are as follows, to-wit:

J. F. Rodgers, doing business under the style and firm name of J. F. Rodgers & Company; A. C. Metts, doing business under the style and firm name of A. C. Metts & Company; C. W. Connell and W. C. Connell, a co-partnership, doing business under the style and firm name of Connell Brothers; H. J. Murff, doing business under the style and firm name of H. J. Murff & Company; S. W. Haaga; H. L. Turpin, doing business under the style and firm name of H. L. Turpin & Company; E. P. Eskridge, doing business under the style and firm name of E. P. Eskridge Company; Max Sansing, doing business under the style and firm name of Sansing & Binder; B. F. Oliver, doing business under the style and firm name of B. F. Oliver [fol. 2] & Company; Lamar Sellers, doing business under the style and firm name of Lamar Sellers & Company; H. S. Moore, doing business under the style and firm name of H. S. Moore & Company; all citizens and residents of the City of Clarksdale, Coahoma County, Mississippi and the Delta Division of the Northern District of Mississippi; and B. O. McGee, R. W. McGee, and B. S. Milam, a co-partnership doing business under the style and firm name

of McGee, Dean & Company, citizens and residents of the City of Leland, Washington County, Mississippi, and in the Southern District of said State; Fisher Cotton Company, a corporation existing under the Laws of the State of Mississippi, domiciled at and a citizen of the City of Greenville, said Washington County, Mississippi; S. B. Wilson, doing business under the style and firm name of S. B. Wilson & Company, a citizen and resident of the City of Memphis and the State of Tennessee; and Cooper & Brush-Newberger Cotton Company, a corporation organized and existing under and by virtue of the Laws of the State of Delaware, and a citizen and resident of said state. All said plaintiffs are engaged in the business of buying, selling, and shipping cotton, as hereinafter particularly alleged, in the State of Mississippi, and said plaintiffs allege that the question herein presented in one of general and common interest to the cotton buyers, sellers, and shippers doing business in the Mississippi Delta hereinafter delineated, who constitute a class so numerous that it is impracticable for all of them to be joined as plaintiffs herein, and, there-
[fol. 3] fore, plaintiffs sue herein for themselves and all others in like situation, members of said class who may come in under the terms of the decree hereinafter prayed, upon such terms as may be fixed by said decree.

The full names so far as known to plaintiffs, and the citizenship and residence of the defendants are as follows, to-wit:

W. L. Matthews, Sheriff and ex-officio Tax Collector of Coahoma County, Mississippi, a citizen and resident of said Coahoma County, Mississippi; Lester C. Franklin, a citizen and resident of Coahoma County, Mississippi; H. H. Casteel, a citizen and resident of Madison County, Mississippi, in the Southern District of said State; and Webb Walley, a citizen and resident of Hinds County, Mississippi, in the Southern District of said State; the three last mentioned defendants being the members of the Board of State Tax Commissioners of the State of Mississippi.

II

The jurisdiction of this court depends upon the fact that the matter in controversy herein, exclusive of interest and costs, exceeds the value of Three Thousand ($3,000.00)

Dollars, and arises under the Constitution of the United States in that plaintiffs herein assert the right to engage in carrying on business in interstate and foreign commerce free from molestation and the burdens hereinafter set forth, [fol. 4] placed thereon by defendants herein, and on the further fact that the defendants are undertaking, as hereinafter alleged, to deprive plaintiffs of such right so to engage in interstate and foreign commerce, and to deprive plaintiffs of the right to earn their livelihoods by engaging in such interstate and foreign commerce, which right is of the value of more than Three Thousand ($3,000.00) Dollars as hereinafter alleged, and, therefore, jurisdicition is vested in this court under and by virtue of the terms and provisions of Section 41 (1) of Title 28, U. S. C. A.

The jurisdiction of this court further depends upon the fact that this is a suit in equity authorized by law to be brought by the plaintiffs to redress the deprivation of the right of the plaintiffs, as aforesaid, to engage in interstate and foreign commerce, of which the defendants herein are undertaking to deprive the plaintiffs under color of certain statutes of the State of Mississippi hereinafter referred to, which right so to engage in interstate and foreign commerce is secured to the plaintiffs by Article 1, Section 3 and Article 14, Section 1 of the Amendments to the Constitution of the United States, and, therefore, jurisdiction is vested in this court under the provisions of Section 41 (14) of Title 28, U. S. C. A.

[fol. 5]

III

Plaintiffs are, and have been, as hereinabove and hereinafter alleged, engaged in the business of what is commonly known as cotton buyers and shippers. The plaintiffs herein are all actively engaged in purchasing, selling, and shipping cotton upon the market for cotton, as hereinafter set forth, which is now and has been for many years in the past maintained in the City Clarksdale, Mississippi. They are likewise engaged in buying, selling, and shipping cotton upon the other markets maintained in the Mississippi Delta, hereinafter mentioned and described, at Greenwood, Mississippi; Cleveland, Mississippi; Indianola, Mississippi; Greenville, Mississippi; Yazoo City, Mississippi; Belzoni, Mississippi; and Vicksburg, Missis-

sippi; and plaintiffs allege that the conditions hereinafter stated as appertaining particularly to the cotton market maintained in Clarksdale, Mississippi, likewise appertain, in all essential features, to the other markets herein mentioned, and conditions described herein with reference to the said market at Clarksdale, Mississippi, are illustrative of the general condition in the cotton business at all of said markets.

IV

The Mississippi Delta, an alluvial body of land located within the confines of the State of Mississippi, comprises [fol. 6] about six thousand six hundred fifty square miles; it is bounded on the north by the northern boundary of the State, and extends along the western boundary of said state, in a southerly direction, for approximately one hundred ninety miles, the western boundary thereof being the Mississippi River. Its width varies from a few yards to approximately fifty miles. The said Mississippi Delta was formed by the action of the Mississippi River in overflowing the same, and gradually building it up to a height at which it became susceptible of cultivation. The character of the soil in said Mississippi Delta makes it peculiarly adaptable to the growing of what is commonly known as Delta-type, long staple cotton, which is a cotton, and a peculiar type of cotton, recognized throughout the world in the cotton trade as being of a superior type, character, and strength.

Clarksdale, Mississippi, is located in the heart of said Mississippi Delta about seventy miles south of the northern boundary line of said State, and about fifteen miles east of the Mississippi River. The said Mississippi Delta is exclusively an agricultural community, and its principal crop is that of said long staple cotton. It produces annually a crop of approximately seven hundred thousand bales, and said cotton is the only product which is raised by the agriculturists located in said Mississippi Delta, and which is sold upon the open market, and is the source [fol. 7] from which is produced the cash revenue out of which practically the entire populace of said Mississippi Delta derives its livelihood.

The said cotton, when it ripens in the field, is picked by hand, put through a ginnery, by the process of which

machine the lint is removed from the seed, and the lint cotton (in which plaintiffs deal exclusively as hereinafter alleged) is wrapped and tied into bales weighing approximately five hundred pounds each. A bale of cotton, when wrapped and tied at the gin, is approximately five feet in length, three and one-half feet in width, and four and one-fourth feet in height.

By general and uniform custom, bales of cotton from the gin are transported by rail or otherwise, as hereinafter described, to compresses. A compress is a combination storage warehouse and plant equipped with machinery designed to press bales of cotton, under extremely high pressure, for the purpose of reducing its size. A bale, after compression, is only about eighteen inches thick, the purpose of compression being that the railroads and carriers by water in interstate and foreign commerce, as hereinafter described, are enabled thereby to load into cars and ships, for such carriage, approximately three times as much cotton after compression as otherwise would be possible. Approximately twenty-five per cent [fol. 8] of the cotton which is brought and sold upon said market in Clarksdale, hereinafter mentioned, is transported to the compresses hereinafter described by automobile, truck, or wagon, and delivered by that means to said compresses. Approximately seventy-five per cent of said cotton is transported to said compresses by rail over the lines of the Yazoo & Mississippi Valley Railroad Company, a common carrier engaged in interstate commerce, and which is the only such common carrier doing business at said market.

At Clarksdale, there are two compresses owned and operated by a corporation existing under the Laws of the State of Delaware, to-wit: The Federal Compress & Warehouse Company. Said Federal Compress and Warehouse Company has, with reference to both and each of said compresses maintained at Clarksdale, complied with all the terms and provisions of an act of Congress, the short title of which is the "United States Warehouse Act", being Chapter 10, Title 7, U. S. C. A. The said Federal Compress and Warehouse Company complied with the terms and provisions of the said "United States Warehouse Act" for the reason that all of said cotton stored in the said compresses and/or warehouses at Clarksdale, Mississippi,

and handled in the manner above described was and is cotton stored and handled therein for interstate and/or foreign commerce, and the power of Congress to affect, by provisions of its said act, the said cotton so handled and stored [fol. 9] arises only from the fact, as hereinbefore and hereinafter alleged, that said cotton and all of it is stored and handled for interstate and foreign commerce, and Congress, in exercising the power granted it by said Article 1, Section 3, of the Constitution of the United States, over the said cotton, has thereby reserved to itself exclusive jurisdiction, power, and control thereof, and divested the State of Mississippi of any power, if any it might have had, to control and/or regulate the buying, selling, and/or shipping of said cotton.

When cotton is delivered to said compresses, the said Federal Compress & Warehouse Company issues to the owner thereof warehouse receipts, which receipts comply in all things with the terms and provisions of said Act of Congress. Said cotton is universally sold upon the market by transfer and delivery of said warehouse receipts in accordance with the terms of said Act of Congress, and actual samples taken from said bales of cotton; said warehouse receipts being the evidence of the ownership of such cotton.

At Clarksdale, there exists an active market for the purchase and sale of said cotton between farmers raising said cotton and plaintiffs and others engaged in like business, who are purchasing the same with the intention and purpose, as hereinafter alleged, of selling and transporting same in interstate and foreign commerce, which is and was and has been a universal custom and course of business for more than twenty years past. The price at which said [fol. 10] cotton is sold upon said market at Clarksdale, however, is determined by the value of such cotton upon certain cotton exchanges maintained, respectively, in the Cities of New Orleans, Louisiana, Chicago, Illinois, and New York, New York; and there are maintained, in the City of Clarksdale, Mississippi, offices of brokers who receive daily by wire, for periods of approximately five hours each day, continuous quotations from such exchanges which fix and determine the price at which cotton is sold upon said Clarksdale market. All of said cotton, however, is bought, as hereinafter alleged, by plaintiffs with the uniform pur-

pose and intention (which is and has been the universal course of business) to transport the same in interstate and foreign commerce to the mills located in the states upon the Atlantic seaboard, to-wit: Georgia, South Carolina, North Carolina, and Tennessee; and the mills of the New England States, to-wit: Massachusetts, Rhode Island, and Connecticut; and the mills of foreign countries. None of said cotton is spun or utilized within the confines of the State of Mississippi, or sold to or purchased by any consumer within the confines of the State of Mississippi.

As aforesaid, approximately seventy-five per cent of said cotton is delivered by rail to said compresses at Clarksdale, and plaintiffs allege that, upon the delivery of such cotton to the said carrier by rail at points outlying [fol. 11] said City of Clarksdale, said cotton thereupon is placed in and thereafter remains in the channels of interstate commerce. Plaintiffs, in this connection, allege that the said carrier transports, by rail as aforesaid, the said cotton to the said compress at Clarksdale, and it is there concentrated merely for the purpose of compression and for the purpose of awaiting the determination of its final point of destination outside the State of Mississippi. When the destination of such cotton is determined, the said carrier loads the same out on instructions of the then owner, after having the said cotton compressed, and charges the through freight-rate from the point of origin to the point of destination outside of the State of Mississippi, instead of charging the combined rate for carriage in intrastate commerce from the point of origin to Clarksdale, plus the charge for carriage in interstate commerce from Clarksdale to the point of destination. As for instance: the rate for the carriage in intrastate commerce from Sumner, Mississippi, to Clarksdale, Mississippi, a distance of approximately twenty miles, of an uncompressed bale of cotton is $1.28 per hundred pounds. The through rate for the carriage of a compressed bale of cotton from Clarksdale, Mississippi, to Fall River, Massachusetts, is $1.28 per hundred pounds. The said carrier, instead of charging the combined rate above outlined for carriage from Sumner, Mississippi, to Fall River, Massachusetts, charges the through-rate, which is the intermediate rate, as if there had been no interruption of shipment from Sumner, Mis- [fol. 12] sissippi, to Fall River, Massachusetts. The said

charges are made by said carriers in accordance with the regulations prescribed by the Interstate Commerce Commission in pursuance of the act of Congress creating said commission and the several amendments thereto.

So, therefore, plaintiffs allege that seventy-five per cent of said cotton is actually in the channels of interstate commerce at the time of the original purchase by plaintiffs of the same.

Plaintiffs allege that the general and uniform custom and course of business in handling said cotton upon said market is had and done in the following manner:

The farmer causes warehouse receipts, when the cotton is delivered to the compress, to be issued and delivered either directly to himself or his agent, commonly called a cotton factor. Upon the Clarksdale market, there are approximately twenty-five buyers and shippers who are engaged in the sole business of buying, selling, and shipping cotton in interstate and foreign commerce. The farmer or the factor causes the actual bales of cotton to be sampled, and the cotton is sold to the plaintiffs and other buyers, sellers, and shippers upon said market, upon the basis disclosed by the character of the samples of said cotton, and by endorsement and delivery of the said cotton receipts evidencing the ownership of the same, the price therefor being governed, as aforesaid, by the markets in New York, [fol. 13] Chicago, and New Orleans, as aforementioned. It is uniformly known and understood by the farmer, cotton factor, and the buyer that the buyer is purchasing said cotton solely for the purpose of causing the same to be transported by rail and/or water to said points in the United States and foreign countries where mills convert said cotton into textile products as aforesaid. No cotton that is bought and/or sold upon the Clarksdale market is utilized in the State of Mississippi, but all of said cotton, as aforesaid, is transported for consumption in interstate and foreign commerce.

The general and uniform custom among buyers, shipper, and sellers, as well as the general course of business is that a buyer enters into a contract for either the future or immediate delivery of a certain number of bales of cotton of a certain class, grade, and staple, obligating himself by such contract to deliver to a mill in a foreign state or country such cotton at a given price. Thereupon, such buyer will

go upon the said market at Clarksdale, and purchase cotton of the kind and character which he is obligated to his customer to deliver, and will cause the delivery of said cotton in interstate and/or foreign commerce in accordance with the terms of his contract. A very small proportion of the cotton purchased by shippers, and cotton buyers (not exceeding ten per cent) is bought when no contract for the sale thereof [fol. 14] exists as hereinabove alleged, but, in such cases, it is bought with the sole anticipation and intention on the part of the buyer (which intention is fully known both to the buyer, farmer, and/or factor) to procure a sale of said cotton to some foreign cotton mill or foreign cotton merchant, and to cause the same to be transported in interstate and/or foreign commerce, as aforesaid, at such time as market conditions will justify. Plaintiffs have engaged in the business of buying and selling cotton in the manner aforesaid upon the markets hereinabove described for periods ranging from five to more than twenty years. The business of plaintiffs is commonly known as that either of a cotton buyer, cotton shipper, or words of like import.

In order to acquire a successful business as a cotton buyer, one is first required to spend from three to five years, practically without compensation, in perfecting himself in the knowledge of the various classes, grades, and staples of cotton; likewise, in order to acquire a successful business as a cotton buyer, it is necessary for one to establish what is commonly known in the trade as connections in the various terminal markets where cotton is converted into textile products as aforesaid. These connections refer to customers, that is, either mills or cotton merchants in foreign terminal markets who habitually do business with a given buyer or shipper. It is a matter of extreme difficulty for one to establish such connections, and an established [fol. 15] business as a cotton buyer is measured, as to value, by the amount of cotton which such buyer is able to sell through the connections which he has established by his attention to his business. Plaintiff- are each and all established cotton buyers and shippers engaged in the said business, have established outlets and connections for the ultimate sale and consumption of cotton purchased by them upon the market aforesaid. The business of each individual plaintiff herein necessarily varies, but plaintiffs allege that

the annual business of the plaintiffs herein range from five thousand bales to twenty-five thousand bales each. A reasonable profit for a cotton buyer, in buying and reselling a bale of cotton upon said market in the manner aforeaid, is not less than Two and 50/100 ($2.50) Dollars per bale. Plaintiffs allege that the business of each of them, and the right of each of them to engage in such business free from the burdens and interference hereinafter alleged is vastly in excess of Three Thousand ($3,000.00) Dollars.

V

The State of Mississippi, by an act of its Legislature, Chapter 88 of the Laws of 1930, has undertaken to impose upon the right of the plaintiffs to engage in their said businesses, the necessity on the parts of the plaintiffs of applying in writing to the defendant W. L. Matthews, the [fol. 16] Sheriff and ex-officio Tax Collector of Coahoma County, Mississippi, for a privilege license to engage therein; and has undertaken to likewise require of said plaintiffs the payment by them and each of them of the sum of One Hundred ($100.00) Dollars annually as a privilege or occupation tax upon said business. By the terms of the statute aforesaid, the application in writing by plaintiffs for said license and the payment of said license or occupation tax is made a condition precedent to the right of the plaintiffs to engage in said business. It is further provided by said law that, should plaintiffs engage in said business without having paid said tax and/or without having procured the license aforesaid, plaintiffs and each of them may, upon prosecution and conviction therefor, be punished by a fine of not more than Five Hundred ($500.00) Dollars and/or imprisonment in the county jail for not exceeding six months, which fine and/or imprisonment is in addition to the damages and penalties imposed by said act as hereinafter alleged. It is further provided by said statute that, in the event of the failure of the plaintiffs or any of them *yo* pay the said tax and procure the said license on or before October 1st, 1930, a penalty of double the amount of said tax, to-wit: the sum of Two Hundred ($200.00) Dollars is imposed by said law because of such failure; and it is further provided that the failure to make application in writing for said license is made a [fol. 17] misdemeanor by said law, and is punishable by

a fine of not exceeding Five Hundred ($500.00) Dollars and/or imprisonment of not exceeding six months. Likewise, it is provided that plaintiffs and each of them, in addition to the above stated requirement upon them, as individuals and/or corporations, to make application for and pay the said license or occupation tax, shall pay a privilege tax of Twenty-five ($25.00) Dollars on or before October 1st, 1930, for each employee engaged in their business as buyer or seller of cotton.

Plaintiffs allege that the said provisions of said law and each of them constitute a burden upon interstate commerce, and an unlawful and unconstitutional burden upon the right of the plaintiffs to engage in such interstate and foreign commerce, and to pursue their occupations, as aforesaid, and that the several terms and provisions of the said statute aforesaid are repugnant to said Article 1, Clause 1 of the Constitution of the United States, commonly known as the "Commerce Clause" thereof.

Plaintiffs further show that the defendant W. L. Matthews, Sheriff and ex-officio Tax Collector, as aforesaid, is charged by law with the duty of collecting, enforcing the collection of the said tax and the said penalties, and of prosecuting persons, and especially the plaintiffs, who fail [fol. 18] to comply with the terms and provisions of the said act; that, by the terms and provisions of Chapter 238 of the said Laws of 1930, the defendants Lester C. Franklin, H. H. Casteel, and Webb Walley, constituting the members of the State Board of Tax Commissioners of the State of Mississippi are likewise charged with the duty of enforcing all of the terms and provisions of the said Chapter 56 of the said Laws of 1930; that the said defendants and each of them are now threatening the said plaintiffs and each of them with the institution of suits to enforce the payment of the said unlawful tax and the said enormous penalties, and are threatening the plaintiffs with criminal prosecution if they should fail to pay said tax and procure said license on or before October 1st, 1930, and threatening the issuance by him, the said W. L. Matthews, of warrants of distress, and procuring the issuance of warrants for the arrest of said plaintiffs for failure to procure the license in the manner aforesaid that the said W. L. Matthews threatens, in pursuance of the supposed authority conferred upon him, by warrants of distress, to

levy upon and seize the real and personal property of the plaintiffs, and that such levy and/or seizure, if made, will constitute and be a cloud upon the title of plaintiffs and each of them to their several properties which they are entitled, under the law, to hold and maintain free from all molestation and interference.

[fol. 19] VI

Plaintiffs state and allege that they are without remedy at law, and are, therefore, entitled to seek the aid of this, a court of equity, and for grounds of seeking such aid, they state the following, to-wit:

(1) That this court, by taking and assuming jurisdiction of this suit, will prevent a multiplicity of suits in this: that, unless the court does assume and take jurisdiction of this cause and issue the injunction hereinafter prayed, the plaintiffs and each of them, and all others for whom they sue herein, will be required to institute and prosecute at law approximately three hundred separate and individual suits as against the defendants herein and/or the officers of the State of Mississippi who may be sued for the return of such unlawful and illegal taxes. Plaintiffs, in this connection, allege that there are approximately three hundred cotton buyers in the Mississippi Delta upon whom has been imposed the necessity of paying the privilege or occupation tax aforesaid; that plaintiffs and each of them will be subjected to the issuance and levy of warrants of distress upon their real and personal property, as aforesaid, the institution and prosecution of indicidual suits as against them and each of them for the collection of the said taxes, damages, and penalties, as aforesaid, and the institution and prosecution of individual criminal pro-
[fol. 20] ceedings as against them and each of them for failure to pay said tax; that "The Board of Levee Commissioners for the Yazoo-Mississippi Delta", a body corporate and politic, existing under the Laws of the State of Mississippi, has, in pursuance of the supposed power and authority vested in it under and by virtue of the terms of said Chapter 56 of the Laws of 1930 and Chapter 80 of the Laws of 1902, imposed a like privilege tax for its use and benefit upon each of the plaintiffs herein, and that it will institute and prosecute, as against the plaintiffs

and each of them, individual and separate suits for the collection of the said taxes and penalties, and criminal prosecutions in accordance with the terms of the said statutes and the ordinances of the said "The Board of Levee Commissioners for the Yazoo-Mississippi Delta". The City of Clarksdale has likewise imposed upon the plaintiffs the necessity of paying a privilege tax equal to one-half the amount supposed to be due to the State of Mississippi as authorized by the said Chapter 88 of the Laws of 1930, and it will, unless relief is granted to the plaintiffs, as hereinafter prayed, institute like, separate, and individual suits as against the plaintiffs herein; and, therefore, plaintiffs show that this, their suit is one of equitable cognizance, and they are entitled to prosecute and maintain said suit in this, a court of equity.

Plaintiffs further allege that, in each and all of the said suits that may and will be prosecuted against them and [fol. 21] each of them, or must necessarily be prosecuted by them and each of them, and/or by or against all other buyers and shippers of cotton, comprising a class, as aforesaid, doing busines in the said Mississippi Delta as aforesaid, consisting of approximately three hundred buyers and shippers as aforesaid, the same facts as are presented to this court by this bill will be presented to and necessarily determined by such other courts as may have jurisdiction thereof, and the same principle of law, to-wit: the fact that the imposition of the privilege or occupation tax as aforesaid is as interference with and a burden upon interstate commerce, will likewise be presented to such other courts as may have jurisdiction of the many and multiplicious actions that may or will be brought about unless this court intervenes and adjudicates and determines the said question of law and of fact herein presented, which said question of law and of fact is the same identical one that will be solely involved in each and all of such actions as may be hereafter brought and prosecuted by or against the plaintiffs herein, and by or against the said cotton buyers and shippers constituting and composing a class as aforesaid. That is to say that, in each and all of the actions sought to be avoided herein, and which this court should and ought to avoid by its inter-[fol. 22] position and the exercise of its equitable power

hereinafter prayed, the same principal of law and the same state of facts will be involved, and this court may determine, in this single action, such identical facts and law to be involved in such other actions, and thereby avoid the manifold actions herein sought to be avoided.

The said plaintiffs and each of them charge and aver that the facts hereinabove alleged are equally applicable to each of the plaintiffs herein and each of the class represented by the plaintiffs herein, and that the principle of law hereinabove specifically set out has application to and will be determinative of the rights of each of the plaintiffs herein and each member of the class represented by the plaintiffs herein, and therefore, that the determination of the single state of facts hereinabove alleged and the determination of the legal principles hereinabove set forth as governing the said facts would apply equally to each of the several plaintiffs herein and each member of the class for which plaintiffs herein sue.

Said plaintiffs charge and aver that no fact or circumstance, right or custom, or principle of law exists which would or could be differently applied to the several rights of the plaintiffs herein so as, in any wise, to grant to either of the plaintiffs herein additional rights or remedies [fol. 23] not hereinabove specifically set forth other than those hereinabove asserted, set out, and averred.

(2) Plaintiffs further allege that they are without adequate remedy at law in the premises in that the State of Mississippi has provided no means whereby the plaintiffs may recover, in any event, all of the taxes which they may pay, whether under protest or not, and plaintiffs especially allege that, in the event they should pay the said taxes to the defendant Matthews, he, the said defendant, will deduct, from the amount paid by them, an amount equal to ten per cent of the tax as his commission, and that there is no remedy for the plaintiffs to recover the said amount of said commission or any part thereof.

Plaintiffs further allege that there is no law of the State of Mississippi which authorizes the re-payment to the plaintiffs, and no means whereby the plaintiffs may recover any damages that they may be required to pay, and which the defendants are now seeking to require them to pay; and,

therefore, plaintiffs allege, as aforesaid, that they are without full, adequate, or complete remedy at law.

(3) Plaintiffs further allege, by the terms and provisions of Section 304 of Hemmingway's Annotated Mississippi Code of 1927, that the State of Mississippi has created and enlarged the right and remedy in equity to restrain the enforcement and collection of the said taxes, and that such right and remedy plaintiffs are entitled to assert and maintain in this court.

[fol. 24] (4) Plaintiffs further allege that, unless relief is granted them in this court, as hereinafter prayed, they will suffer irreparable damage and injury in that the enforcement of the said unlawful and illegal statute of the State of Mississippi would seriously impair, if not destroy, the business of the plaintiffs, and plaintiffs allege that the suspension of their business for a period of thirty days would cause the loss to them and each of them of the connections which they have acquired in the said terminal markets, and that the damage occasioned by the loss of such connections and/or destruction of their said businesses would not be measurable in any court, and would exceed in amount, as to each of plaintiffs, $3,000.00, and no court is vested with jurisdiction or power to give or grant to the plaintiffs any such damages which they will so surely sustain. They especially allege that at and on the date of the filing of this bill, the prosecution of their business uninterruptedly is essential to the continued operation of their business inasmuch as their business as cotton buyers, buying through and for their several connections as above outline-, extends over a period as of September 1st, and continues to and through March 1st of each year, at a time when the producer of cotton in the Mississippi Delta is gathering, marketing, and offering the said cotton for sale in the manner and under the conditions as above outlined.

[fol. 25] (5) Plaintiffs further allege that they and each of them have contracts outstanding, made with their connections aforesaid and customers of many years standing, and that they are now deterred from buying the cotton necessary to perform the said contracts, and that the threats of the said defendants herein constitute clouds upon the right of the plaintiffs to continue the fulfil-ment of such con-

tracts, the said defendants insisting that the said plaintiffs have no right to continue in the business of fulfilling the said contracts by the purchase of cotton as aforesaid without first having obtained a license from the State of Mississippi so to do, and having first paid to the said State of Mississippi the said occupation tax demanded of them as aforesaid.

(6) Plaintiffs further allege that, if they and each of them should not be permitted to combine together in seeking the interposition of equity to enforce their several rights as hereinabove set out, neither of the said plaintiffs, separately, would be able to present its rights to the court for the reason that the amount of the tax as levied by Chapter 88 of the Laws of 1930 on behalf of the State of Mississippi amounts to the sum of One Hundred ($100.00) Dollars, and, if and in the event they should individually be required to pay said One Hundred ($100.00) Dollars into the Treas-
[fol. 26] ury of the State of Mississippi, and then institute a separate cause of action for the recovery of said sum, they severally would be compelled to institute their several causes of action therefor, and be required and compelled, in order to adequately present the questions as herein presented, to institute separate causes of action, employ an attorney therefor, and, being a cause of the nature as hereinabove alleged, to take the said cause to the highest state court of the state, and perhaps of the United States, and that the expense attendant to the presentation of the courts of the State of Mississippi or the United States would be prohibitive, and if successful, the plaintiffs could not and would not be indemnified, and, therefore, neither of the plaintiffs has an adequate remedy at law.

VII

Premises considered, plaintiffs pray as follows:

(a) That the application of the plaintiffs for the issuance of the temporary injunction hereinafter prayed be heard before a court organized and constituted in accordance with the provisions of Section 380 of Title 28 U. S. C. A.; that, at such hearing for such temporary injunction, and injunction issue out of this court enjoining and restraining the defend-
[fol. 27] ants or either of them from collecting or seeking

to collect from the plaintiffs the said privilege or occupation tax, and/or said damages as provided by Chapter 88 of the Laws of the State of Mississippi of 1930; and likewise enjoining and restraining the said defendants from prosecuting and undertaking to prosecute the plaintiffs or either of them for failure to pay said tax and/or said damages; and likewise enjoining and restraining the said defendant Matthews from issuing and/or levying warrants of distress as against the property of the said plaintiffs or either of them; and likewise enjoining the said defendants from interfering with or molesting the plaintiffs in any manner in the prosecution and enjoyment of the right to engage in their said business as aforesaid.

(b) Upon final hearing hereof, plaintiffs pray that it be adjudicated and determined that they have the right to engage in their said business free from the burdens placed thereon by said Chapter 88 of said Laws of 1930, and free from molestation or interference on the part of the said defendants herein and/or any other executive officer of the said State of Mississippi who are now charged with, or may hereafter be charged with the duty of enforcing the collection of the said privilege tax, damage, and/or the criminal provisions of said statute; and that the said Chapter 88 of said Laws of 1930 be declared invalid and unenforceable in so far as it undertakes to impose, upon plain-
[fol. 28] tiffs and all others for whom this suit is brought and prosecuted, the said privilege or occupation tax; and that the temporary injunction herein prayed be made perpetual as against the defendants herein and such other said officers of the State of Mississippi.

And, if plaintiffs have prayed for improper relief, they pray for such other, further, and more general relief as in equity may seem mete and proper.

As in duty bound, they will ever pray.

Edward W. Smith, Roberson & Cook, Sam C. Cook,
Solicitors for the Plaintiffs.

Duly sworn to by A. D. Metts. Jurat omitted in printing.

[fols. 29-32] [File endorsement omitted.]

[fol. 33] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER FOR TEMPORARY INJUNCTION—Filed Sept. 20, 1930

The application for the issuance of a temporary injunction prayed in the verified Bill of Complaint in the above styled cause having been this day presented to the undersigned Edwin R. Holmes, District Judge for the Southern District of Mississippi, and, upon opening and reading said verified Bill of Complaint, it appearing to the undersigned that the said application involves the issuance of an interlocutory injunction restraining the enforcement, operation, and execution of a statute of the State of Mississippi by the defendants named in said bill, and the said undersigned District Judge, having in pursuance of the directions and requirements of Section 380, Title 28, U. S. C. A., called to his assistance Honorable Rufus E. Foster, Judge of the Circuit Court of Appeals for the Fifth Circuit, and Honorable Allen Cox, District Judge of the Northern District of Mississippi; it is ordered that the said application be presented to and heard by the said Rufus E. Foster, Allen Cox, and the undersigned at New Orleans, Louisiana, at the court room of the United States Circuit Court of Appeals for the Fifth Circuit on September 27th, 1930, at 10 o'clock in the forenoon; and it is further ordered that the Clerk of [fols. 34-37] the District Court for the Northern District of Mississippi issue and deliver to the Marshal of the Northern and Southern Districts of Mississippi appropriate notice of such hearing, to be served upon the defendants in the above entitled cause, and Theodore G. Bilbo, Governor of the State of Mississippi, and George T. Mitchell, Attorney General of said State.

Ordered and adjudged on this September 20th, 1930.

E. R. Holmes, District Judge.

[File endorsement omitted.]

[fol. 38] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO DISMISS THE ORIGINAL BILL—Filed Sept. 29, 1930

To the Honorable Rufus E. Foster, Judge of the United States Circuit Court of Appeals for the Fifth Circuit; Honorable Allen Cox, Judge of the District Court of the United States for the Northern District of Mississippi, and Honorable Edwin R. Holmes, Judge of the District Court of the United States for the Southern District of Mississippi, convened as a special court at New Orleans, Louisiana:

Now comes Geo. T. Mitchell, Attorney General of the State of Mississippi, in his own behalf and in behalf of all defendants named in the original bill, and moves the Court to dismiss the original bill on file herein, and for grounds of said motion, assigns the following, to wit:

1. There is no equity on the face of the bill.

2. The complainant has a plain, adequate and speedy remedy at law.

[fols. 39-42] 3. Section 56, Chapter 88, Laws of 1930, does not contravene any provision in the Constitution of the United States.

4. A Federal Court of Equity is without jurisdiction to enjoin a sover-ign state or state officials from enforcing a state statute, which does not violate the Federal Constitution.

5. The amount in controversy is less than $3,000.00.

6. Under the facts stated in the original bill, the tax levied by Section 56, Chapter 88, Laws of 1930, does not place a burden on or regulate interstate commerce.

Respectfully submitted.

Geo. T. Mitchell, Attorney General, by J. A. Lauderdale, Assistant Attorney General, Attorneys for Defendants.

[File endorsement omitted.]

[fol. 43] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER FOR TEMPORARY INJUNCTION—Filed Nov. 8, 1930

This day this cause came on to be heard on the application for the issuance of the temporary injunction prayed in the original bill on file herein before R. E. Foster, Judge of the Circuit Court of Appeals for the Fifth Circuit, E. R. Holmes, and Allen Cox, District Judges of the Southern and Northern Districts of the State of Mississippi, respectively, and the said court having been convened in strict accordance with Section 266 of the Judicial Code, and notice having been given for more than five days to each of the defendants of the application for the temporary injunction prayed in the Bill of Complaint on file herein, and the said defendants having each and all entered their several appearances herein, and having interposed a Motion to Dismiss the Original Bill of Complaint, and the plaintiffs and defendants being present in open court and represented by counsel, and the court having heard and considered the said cause, and being of the opinion that the plaintiffs are entitled to the issuance of a temporary injunction as prayed in the Original Bill of Complaint and as applied for on this their hearing of the application for the issuance of the said temporary injunction; the court being of the opinion that the plaintiffs, on the face of the [fol. 44] Bill of Complaint, are engaged in interstate commerce, and that Chapter 88 of the Laws of 1930 of the State of Mississippi imposes a privilege tax for the privilege of engaging in said occupation, and requiring, as a condition precedent to engaging in said occupation of cotton buyer, that the license fee be paid, and, in default thereof, subjecting said plaintiffs to penalties, fines, and imprisonment, and, in addition thereto, exacts a civil penalty of double the amount of the tax; and the court being further of the opinion that, in so far as said Act undertakes to levy a privilege tax on the occupation of cotton buyer of the class of the plaintiffs as alleged in the Bill of Complaint, it contravenes the Commerce Clause of the Constitution of the United States, and is inoperative and void; it further appearing to the court that the defendants are the officers of the State of Mississippi charged with the enforcement both civilly and criminally, of the said Act,

and that they are threatening to subject the said plaintiffs to the penalties as provided in said statute; it further appearing to the court that the said tax was due and payable on September 1st, 1930, and that each of the said plaintiffs has refused to pay the said tax as being unconstitutional and inoperative as to them, and the defendants will, unless restrained by order of this court, enforce the provisions and penalties as provided in said Act, and it appearing [fol. 45] that the plaintiffs are without adequate remedy at law;

It is, therefore, ordered and adjudged that a temporary injunction forthwith issue by the Clerk of this court enjoining and restraining the defendants, W. L. Matthews, Sheriff of Coahoma County, Mississippi, and Ex-Officio Tax Collector for the State of Mississippi, and L. C. Franklin, Chairman, and H. H. Casteel and Webb Walley, Members, of the Board of State Tax Commissioners of the State of Mississippi, or either of them, from collecting or seeking to collect from the plaintiffs: J. F. Rodgers, A. C. Metts, C. W. Connell, W. C. Connell, H. J. Murff, S. W. Haaga, H. L. Turpin, E. P. Eskridge, Max Sansing, B. F. Oliver, Lamar Sellers, H. S. Moore, B. O. McGee, R. W. McGee, B. S. Milam, Fisher Cotton Company, a corporation, S. B. Wilson, and Cooper & Brush-Newberger Cotton Company, a corporation; and such other persons of the same class who may, by order of this court, intervene herein, and, by order of this court, obtain the benefit of such injunction, and none others whatever, the said privilege or occupation tax and/or damages as provided by said Chapter 88 of the Laws of the State of Mississippi of 1930; and likewise enjoining and restraining the said defendants from prosecuting and undertaking to prosecute said plaintiffs and/or such other persons hereinabove referred to for failure to pay said tax and/or said damages; and likewise [fol. 46] enjoining and restraining the said defendant Matthews from issuing and/or levying warrants of distress as against the property of the said plaintiffs and/or said other persons; and likewise enjoining the said defendants from interferring with or molesting the plaintiffs and/or said other persons in any manner in the prosecution and enjoyment of the right to engage in their business of cotton buyers and/or sellers, the said injunction to continue in force until the further orders of this court; and the said

plaintiffs and defendants having agreed upon the amount of the bond to be made upon the issuance of said temporary injunction, it is ordered that the said injunction issue upon the plaintiffs' making and filing with the Clerk of this court a bond, conditioned as required by law, in the penal sum of Three Thousand ($3,000.00) Dollars, which bond shall be approved by the said Clerk of this court.

All ordered and adjudged on this 7th day of Nov. 1930.

E. R. Holmes.

[File endorsement omitted.]

[fol. 47] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER—Filed Nov. 20, 1930

Now come all of the defendants in the above styled cause by Geo. T. Mitchell, Attorney General of the State of Mississippi, and for answer to the original bill now on file against them, say:

I

Defendants admit the allegations in Section I of said bill in reference to the names, citizenship and residence of the parties plaintiff and defendant.

II

Defendants admit the allegations contained in Section II of said bill, except defendants deny that the matter in controversy herein, exclusive of interest and cost, exceeds the value of $3,000.00, and deny that they are undertaking to deprive plaintiffs of the right to engage in interstate and foreign commerce, or to deprive plaintiffs of the right to earn their liv-lihood by engaging in interstate and foreign [fol. 48] commerce, and deny that jurisdiction is vested in this Court under and by virtue of the terms and provisions of Section 41 (1) of Title 28, U. S. C. A.

Defendants further deny that they have at any time attempted or threatened to deprive the plaintiffs herein of the right to engage in interstate and foreign commerce.

Defendants deny that they are undertaking to deprive the plaintiffs under the color of certain statutes of the State of Mississippi referred to in said bill the right to engage in interstate and foreign commerce, and deny that Section 41 (14) of Title 28, U. S. C. A., gives this Court jurisdiction of this cause of action.

III

Defendants admit the allegations in Section III of said bill.

IV

Defendants admit the allegations in Section IV of said bill, except as are herein specifically denied.

Defendants admit that at Clarksdale there exists and active market for the purchase and sale of cotton between farmers raising said cotton and plaintiffs, and others engaged in like business, but deny that said plaintiffs pur- [fol. 49] chase said cotton with the intention and purpose as alleged in said bill, of selling and transporting same in interstate and foreign commerce. They deny that it is, and was, and has been, a universal custom and course of business for more than twenty years past. Defendants allege that a large part of the cotton purchased by plaintiffs in the city of Clarksdale and other markets therein described is sold to local buyers and is not shipped out of the State by the purchaser and seller thereof.

Defendants admit the allegations in reference to the market price of cotton.

Defendants deny that all of said cotton is bought by plaintiffs with the uniform purpose and intention to transport same in interstate and foreign commerce to mills located in states other than the State of Mississippi, and in foreign countries, but say that said plaintiffs buy cotton from local residents of the State of Mississippi and sell cotton to local residents of the State of Mississippi, and that said cotton is not shipped out of or from the State by the plaintiffs who buy and sell said cotton in said manner.

Defendants admit the allegations in said bill in reference to the delivery of the cotton therein named to the compress or compresses at the city of Clarksdale, but deny that said [fol. 50] cotton, or any part of same is actually in the

channels of interstate commerce until said cotton is received by common carriers for shipment to other states.

Defendants admit that when the farmer or producer of the cotton carries it to the warehouse receipts are issued and delivered either directly to the producer or his agent, commonly called a cotton factor, and that these receipts are negotiable. Defendants, however, deny that there are approximately twenty-five buyers and shippers in the Clarksdale cotton market who are engaged in the sole business of buying, selling and shipping cotton in interstate and foreign commerce, but allege that said cotton buyers, and especially the plaintiffs herein, buy and sell cotton to other local dealers and cotton buyers.

Defendants deny that when plaintiffs herein purchase cotton on the Clarksdale market that it is uniformly known and understood by the farmer, cotton factor and the buyer that the buyer is purchasing said cotton solely for the purpose of causing the same to be transported by rail and/or water to certain points in the United States and foreign countries where mills convert said cotton into textile products, but allege that said cotton buyers, and especially plaintiffs herein, buy cotton from the farmer, cotton factor or other buyers, and sell same to other resident buyers in the city of Clarksdale and the State of Mississippi.

[fol. 51] Defendants deny that a very small portion of cotton purchased by shippers and cotton buyers (not exceeding ten per cent) was bought when no contract for the sale thereof existed as alleged in the bill, and would show that said buyers and shippers buy cotton when they have no contract and sell it again on the Clarksdale market, and that at the time they purchase same it is not bought with the sole anticipation and intention on the part of the buyer to procure a sale of said cotton to some foreign cotton mill, and cause the same to be transported in interstate or foreign commerce at such time as market conditions will justify, but allege that said buyers buy said cotton for the purpose of selling it again at a profit, and that when cotton is bought it is sold by the purchaser in large quantities to the other local buyers.

Defendants admit the allegations in the last paragraph of Section IV, but say, and would show to the Court, that on account of said buyers not having terminal markets in which to dispose of all of said cotton that they very often

dispose of large quantities and a large part of their business is selling cotton on the Clarksdale market.

Defendants further allege that there are numerous cotton buyers in the State of Mississippi who buy and sell cotton solely and wholly in intra-state commerce.

[fol. 52] Defendants admit that the business of each of the plaintiffs and the right of each of them to engage in such business is in excess of $3,000.00. Defendants would show, however, that the amount in controversy for each of said plaintiffs in this law suit is only $100.00, the amount of tax due by each of them.

V

Defendants admit the allegations in paragraph 1 of Section V, but say that said section has no application to any person, firm or corporation engaged solely and alone in interstate commerce, and that no officer of the state of Mississippi, and none of defendants named in said bill, undertake, attempt or threaten to enforce the provisions of said act when a person is engaged in interstate commerce alone. Defendants admit, however, that when a person is engaged in both interstate and intrastate business that said defendants do attempt to enforce the provisions of said act.

Defendants further allege that said plaintiffs are engaged in intra-state business and that said tax does not constitute a burden upon interstate commerce, and deny that said tax is an unlawful and unconstitutional burden on the rights of plaintiffs to engage in interstate and foreign commerce and to pursue their occupations as alleged in said bill, and deny that the several terms and provisions of said statute [fol. 53] aforesaid are repugnant to Article 1, Clause 3, Section 8 of the Constitution of the United States, commonly known as the Commerce Clause thereof.

Defendants admit that they, except for the injunction heretofore granted in this cause, would attempt to collect the tax levied by the statute of the State of Mississippi against the defendants, but would show that their reason for collecting said tax is based upon the fact that said plaintiffs, and each of them, are engaged in intra-state commerce and are liable for said tax.

VI

Defendants deny that plaintiffs are without remedy at law, and deny that they are entitled to seek the aid of a Federal Court of Equity.

(1) Defendants deny that by taking and assuming jurisdiction of this suit that this Court will prevent a multiplicity of suits, and they state that only one suit against each of said plaintiffs could be brought to determine their civil liability, and one each against plaintiffs to determine their criminal liability. However, defendants allege that until the principles of law are settled by the highest court of competent jurisdiction the said State officials would not attempt to harrass said plaintiffs by numerous suits in order to enforce the collection of said tax.

[fol. 54] Defendants deny that the facts hereinabove enumerated are equally applicable to each of plaintiffs herein, and each of the class represented by the plaintiffs herein, and that the principles of law set out in said allegation has application to and will be determinative of the rights of each of plaintiffs herein, and each member of the class represented by the plaintiffs herein, and allege that there may be certain cotton buyers in the State of Mississippi who do a very small intra-state business. There are others who do both intra-state and interstate business, and still others who do a large intra-state business and a very small interstate business, and still others who are engaged solely and alone in intra-state business. The liability of said plaintiffs and other cotton buyers in the State of Mississippi depends upon the question of fact to be determined in each case.

(2) Defendants deny that plaintiffs are without adequate remedy at law in the premises, and that the State of Mississippi has provided no means whereby the plaintiffs may recover taxes erroneously paid. Defendants allege that under the laws of the State of Mississippi the plaintiffs may pay the tax under protest and then sue the officer collecting same for recovery of the taxes, and that each and every officer charged with the duty of collecting taxes in the State of Mississippi, and especially defendants herein, [fol. 55] are required to give bond, and that said bond would be liable to the plaintiffs for any tax unlawfully

collected by the defendants. Defendants would further show that under and by virtue of the provisions of Chapter 196, Laws of 1926, Section 3276, Code of 1930, taxes erroneously paid by plaintiffs and others will be refunded to such tax payers even though same is not paid under protest.

(3) Defendants admit that by the terms and provisions of Section 304, Hemingway's Code of 1927, Section 420, Code of 1930, the State of Mississippi has created and enlarged the right and remedy in equity to restrain the enforcement and collection of said taxes, but deny that plaintiffs are entitled to assert and maintain such right in this Court, because the jurisdiction in this case is not based upon diversity of citizenship.

(4) Defendants deny that the enforcement of the statute herein as against plaintiffs would cause them to suffer irreparable damage and injury to their business, but allege that said plaintiffs are engaged in intra-state commerce and are liable for said tax, and by paying the small tax of $100.00 they would escape all injury and damages alleged in said paragraphs (4) and (5).

(6) Defendants admit that the plaintiffs, and each of [fol. 56] them, should not be permitted to combine together in seeking the interposition of equity to enforce their several rights as set out in the allegations of the bill, and that neither of said plaintiffs separately would be able to present its rights to the Court for the reason that the amount of tax as levied by Chapter 88, Laws of 1930, on behalf of the State of Mississippi amounts to the sum of $100.00, and defendants allege that said plaintiffs cannot combine their right of action for jurisdictional purposes. Defendants admit that unless said plaintiffs avail in this Court, then in order to adequately present the questions of law involved in this case, it would be necessary to file a suit and take said cause to the highest Court of the State, and perhaps to the United States Supreme Court. However, defendants allege that the expense of litigation in one case would not confer jurisdiction on this Court.

VII

Defendants allege that the farmers or producers of cotton ship the cotton after it has been ginned to the compress

at Clarksdale for the purpose of storing it until they desire to sell it, and for the purpose of placing it there in order that sales and transfers of said cotton may be made by delivery of the compress receipt. Small quantities of this cotton are shipped out soon after being placed in the compress. [fols. 57-64] Large quantities are store- in the compress for months and sometimes for years before it is sold by the producer. Other large quantities are kept in the compress after it is sold by the producer before it is sold for export or transportation to another state. Large quantities of said cotton are bought and sold by plaintiffs herein before it is shipped away. The situs of said cotton is in the State of Mississippi and it does not enter or become a part of interstate commerce until it is actually received by the common carriers for transportation outside the State.

VIII

Defendants now having fully answered the allegations of the original bill on file herein, pray that said temporary injunction heretofore granted by this Court be dissolved, the original bill dismissed, and plaintiffs taxed with all costs in this behalf expended.

Geo. T. Mitchell, Attorney General, by J. A. Lauderdale, Assistant Attorney General, Attorney for Defendants.

[File endorsement omitted.]

[fol. 65] IN UNITED STATES DISTRICT COURT

[Title omitted]

AGREED STATEMENT OF EVIDENCE—Filed Jan. 16, 1931

It is hereby stipulated and agreed by and between the undersigned counsel representing all of the plaintiffs and all of the defendants, respectively, in the above entitled cause as follows, to-wit:

I

The report hereto attached, addressed to said undersigned counsel and signed by Joseph F. Ellis, certified

public accountant, shall be and constitute the evidence before the court upon which said cause shall be finally determined on its merits. The matters and things stated in said report relative to the business of H. J. Murff & Company and B. F. Oliver & Company are equally applicable to the average business of each of the plaintiffs herein, and it is agreed that the course of the business of each of the plaintiffs herein is identical with the averages reflected by the said report.

H

Except for the conclusions of law which are denied by [fol. 66] the answer filed herein, all of the facts stated in the said Bill of Complaint are specifically admitted, except as the said report of the said Joseph F. Ellis should evidence the contrary.

This the 10 day of Jan., 1931.

George T. Mitchell, Attorney General of the State of Mississippi, by J. A. Lauderdale, Assistant Attorney General, Attorney for all Defendants. Edward W. Smith, Roberson & Cook, Sam C. Cook, Attorneys for Plaintiffs.

Messrs. Cutrer & Smith, Clarksdale, Miss.; Messrs. Roberson & Cook, Clarksdale, Miss.; Hon. J. A. Lauderdale, Assistant Attorney General, Jackson, Miss.

GENTLEMEN:

In re Cotton Buyers and Operations

Agreeing to your joing request I am pleased to report that I have made an examination of the books and accounts [fol. 67] of H. J. Murff & Company, Clarksdale, Mississippi, and B. F. Oliver & Company, Clarksdale, Mississippi, for the purpose of determining the extent and manner in which these firms engaged in the interstate shipment of cotton, and also to determine the general manner in which their businesses are and have been conducted.

H. J. Murff & Company are known as "Cotton Buyers and Shippers", (as distinguished from factors and local brokers and "scalpers") and have been in this business in Clarksdale for many years and are considered as a most

representative firm. They also conduct one or more branch offices. During the fiscal year ending August 31, 1930, the period under review, they maintained two branch offices—at Cleveland and Greenwood, Mississippi, and the transactions through those offices are included and reflected in the figures herein submitted.

During the fiscal year ending August 31, 1930, they purchased and sold a total of 15,173 bales of staple cotton, of which 14,895 bales was shipped.

All of this cotton was bought in the delta of Mississippi and was stored in compresses located at various places all [fol. 68] over the Delta, from Hollandale north to Clarksdale, from the time it was purchased under the date shipped.

This cotton was bought for the purpose of filling orders of cotton mills and brokers, and was shipped in the months and to the destinations shown below:

	N. Ca.	S. Ca.	Con.	Rd. I.	Mass.	N. H.	Tenn.	Ver.	La.	Eng.	Hol.	Miss.	Total
Sep.	702	150	100	150	50	..	..	..	..	350	..	3	1,505
Oct.	1,171	210	40	212	500	..	..	..	..	420	..	5	2,558
Nov.	633	346	..	149	550	25	..	..	..	600	..	12	2,315
Dec.	410	253	100	..	350	..	28	..	..	400	..	5	1,546
Jan.	1,060	100	..	57	341	25	153	..	..	900	100	27	2,763
Feb.	295	100	..	100	250	..	157	..	..	50	..	23	975
Mch.	636	100	..	4	25	..	121	100	..	150	..	33	1,159
Apr.	756	..	..	41	29	..	112	..	..	..	..	30	968
May	269	..	..	..	177	..	8	..	2	..	..	1	457
June	99	..	..	..	148	..	134	..	..	..	..	39	420
July	43	9	..	..	118	..	2	..	..	..	..	50	222
Aug.	11	..	..	..	214	..	..	..	..	..	..	60	285
Totals	6,085	1,268	240	713	2,752	50	715	100	2	2,870	100	*278	15,173

*Includes 42 bales unidentified cotton.

The total sale price of this 15,173 bales of cotton was $1,874,004.85, of $213.509 per bale.

Therefore, the division of this business as between inter- [fol. 69] state, foreign, and intrastate, applying a uniform average bale price of $123.509, as above, is as follows:

	Bales	Value
Interstate:		
North Carolina	6,085	751,552.20
South Carolina	1,268	156,609.40
Connecticut	240	29,732.16
Rhode Island	713	88,061.92
Massachusetts	2,752	339,896.77
New Hampshire	50	6,175.45
Tennessee	715	88,308.94
Vermont	100	12,350.90
Louisiana	2	247.01
Total	11,925	1,472,934.75
Foreign:		
England	2,870 B/C	354,483.70
Holland	100	12,350.90
Total	2,970 B/C	366,734.60
Total Interstate and Foreign	14,895 B/C	1,839,669.35
Intrastate:		
Mississippi	278 B/C	34,335.50
Total all cotton	15,173 B/C	1,874,004.85

A distribution on a basis of percentage, as between the several classes of business is as follows:

Interstate	79.09%
Foreign	19.07%
Intrastate	1.84%

[fol. 70] All of the above cotton, (with the exception of that sold in Mississippi; and part of that sold in Tennessee) was sold on orders, against which this cotton was purchased.

The purchases were of a particular grade and staple, as determined from an examination of every individual bale.

As indicative of the large number of classifications in which staple cotton is graded and classed there is copied below the standard "key" to classes, as used by the Staple Cotton Co-operative Association of Greenwood, Mississippi, and which is now generally accepted as a standard of classification for cotton throughout the Delta. This cotton, it will be observed, is classed for grade, staple, color, and preparation as follows:

"For Grade

A is Strict Good Middling.
B is Good Middling.
C is Strict Middling.
D is Middling.
E is Strict Low Middling.
F is Low Middling.
G is Strict Good Ordinary.
H is Good Ordinary.
I is Ordinary.
J is Inferior—or "Dogs".

For Staple

1 is 7/8 inch.

[fol. 71] 2 is 1 inch.
3 is 1 to 1 1/16 inch.
4 " 1 1/16 inch.
5 " 1 1/16 to 1 1/8 inch.
6 " 1 1/8 inch.
7 " 1 1/8 to 1 3/16 inch.
8 " 1 3/16 inch.
9 " 1 3/16 to 1 1/4 inch.
10 " 1 1/4 inch.
11 " 1 1/4 to 1 5/16 inch.
12 " 1 5/16 inch.
13 " 1 5/16 to 1 3/8 inch.
14 " 1 3/8 inch.

For color	For preparation
O is White.	A is Excellent.
1 is Wax.	B is Good.
2 is Vim.	C is Fair.
3 is Blue.	D is Gin-Cut.
4 is Spotted.	
5 is Strained.	
9 is Extra White	

To decode D 06 9 C: D denotes middling grade; 06 denotes 1-1/8 inch staple; the 9 denotes extra white color; C denotes fair preparation.

[fol. 72] Middling Was 1-1/4 inch staple Fair preparation would be shown in code as D 10 1 C.

Unless otherwise noted the preparation is B or Good."

Therefore it will be seen that multiplying these ten classes as to grade, fourteen as to staple, seven as to color and four as to preparation gives a total of 3920 possible variations in classifications of staple cotton as recognized by the Association's charts, and by the majority of the cotton trade. Of course some of these classes may not appear on the market, but actually, I am advised, the Association did have over three hundred different active pools last year, each pool representing a distinct class of cotton. In other words, their members' cotton was put in over 300 different groups for staple, grade, color, or preparation, and each of these different groups or pools of cotton was tenderable only on orders calling for that particular class of cotton.

The purpose of this explanation is to show the origin of what is known as "overs".

Orders taken by Murff & Company would call for so many bales of cotton of a particular kind and while cotton bought for purpose of delivering on an order might be up as to grade or staple, it might be a shade off in color [fol. 73] or poor in preparation which, if there were no orders it would "fit", would have to be disposed of.

It would not be practicable to show the date of purchase of the cotton delivered on any particular contract as it is all commingled. Sometimes the cotton is bought and delivered immediately. Again Murff would have orders for delivery late in the season of high-grade cotton

not ordinarily easily obtainable except it is bought early in the season. In such case the cotton of necessity would be bought early and carried in the compress until delivery date.

In order to indicate the extent to which this is necessary, I show below, still referring to Murff & Company's business, the purchases month by month, during this season:

Sept.	4,751
Oct.	5,408
Nov.	1,647
Dec.	2,310
Jan.	212
Feb.	563
Mch.	249
Apr.	181
May	85
June	104
July	33
Aug.	22
Total	15,577

[fol. 74] The difference in the number of bales bought, to-wit: 15,532, as compared with sales of 15,173 bales, is accounted for by the small inventories on hand at beginning and end of the season, as follows:

Inventory Aug. 31, 1929	35	Bales
*Purchases	15,532	"
Total	15,567	"
*Inventory Aug. 31, 1930	394	"
Sold	15,173	"

In order that the stock on hand at the end of each month may be ascertained, I show below, in tabulated form, the accumulated total of purchases and accumulated total of shipments as well as orders on hand unfilled as to the end of each month.

*These items are less rejections.

	Orders to dates shown	Purchases to dates shown	Shipments on orders	Unfilled orders to dates shown	Cotton on hand at dates shown
1929.					
Sept. 1	7,800	35	.....	7,800	35
Oct. 1	11,920	4,759	1,505	10,415	3,254
Nov. 1	13,607	10,159	4,063	9,544	6,096
Dec. 1	13,894	11,806	6,378	7,516	5,428
1930.					
Jan. 1	13,994	14,116	7,924	6,070	6,192
Feb. 1	14,219	14,728	10,687	3,532	4,041
Mch. 1	14,718	14,881	11,662	3,056	3,219
[fol. 75]					
Apr. 1	14,847	15,120	12,821	2,026	2,299
May 1	14,972	15,201	13,789	1,183	1,412
June 1	15,471	15,286	14,246	1,225	1,040
July 1	15,521	15,390	14,666	855	624
Aug. 1	15,521	15,390	14,888	633	502
Aug. 31	15,595	15,577	15,173	422	394

As to the ultimate destination of the 278 bales shown above as "overs", I cannot definitely state. However, from an examination of the books, it appears that it was disposed of as follows:

To other buyers and shippers	31 B/c
To local scalpers and speculative buyers	194 B/C
To pickeries for reclaimation	3 B/C
Rejections	8 B/C
Unidentified	42 B/C
	278 B/C

B. F. Oliver & Company

We also examined the books of B. F. Oliver & Company, Clarksdale, Mississippi, for the part of their fiscal year beginning with September 1, 1930, and ending December 15, 1930.

This firm is also engaged in the business of buying and selling of cotton, maintaining an office at Clarksdale Mis-
[fol. 76] sissippi.

Because of the smaller volume of their business and the fact that their records did not permit, and the further fact that the general features of their business are identical with Murff & Company, a complete analysis of their operations as in the case of Murff & Company is not shown.

They have handled, to date, a total of 1630 bales, which was sold and shipped to destinations as shown below:

Interstate:	
Massachusetts	496 B/C
North Carolina	213
South Carolina	100
Alabama	198
Total	1,007 B/C
Foreign:	
England	457 B/C
Total interstate & foreign	1,464 B/C
Intrastate:	
Mississippi	166 B/C
Total all cotton	1,630 B/C

The total sale price of this cotton was $114,626.49 or $70.323 per bale.

The apportionment of this firm's business, therefore, on a dollars and cents basis is as follows:

Interstate	$70,815.26
[fol. 77] Foreign	32,137.61
Intrastate	11,673.62
Total	$114,626.49

and are a basis of percentages as follows:

Interstate	61.74%
Foreign	27.85%
Intrastate	10.41%

The larger percentage of intrastate sales of this firm, as compared with Murff & Company, I would say is due to several causes, principally among which are:

(1) The small volume of business affords them a narrower "apread" for their purchases. Having fewer orders to fill, there is less variety of cotton to be bought and consequently more likelihood of their having "misfit" bales left over.

(2) In dealing in low price cotton, which has prevailed all this year, it is customary to find the preparation poorer.

(3) Greater difficulty in financing purchases and sales has made it advisable and necessary to "dump" locally small lots of cotton that otherwise would have ordinarily been carried for possible future sales.

These and other factors as well have made it advisable to dispose of a greater part of the purchases locally, which [fol. 78] would otherwise have probably been held for application on orders for future delivery.

An analysis of orders, sales and shipments of this firm is as follows:

	Orders to date shown	Purchases to date shown	Shipments on orders	Unfilled orders to date shown	Cotton on hand at date shown
Sep. 1	350	....	....	350	....
Oct. 1	700	395	200	500	195
Nov. 1	1,351	1,010	905	446	105
Dec. 1	1,576	1,528	1,311	265	217
Dec. 20	1,654	1,684	1,630	454	54

As to the physical handling and movement of this cotton, purchased by these buyers, the procedure is as follows:

This cotton is bought by them, either at the gins, or after it reaches the compresses. Very little cotton is bought at the gin as the buyers prefer to wait until the cotton has been placed in a compress or warehouse and sampled, and the purchase made on the seller's sample, subject to rejection if not up. Then on the purchase of the cotton, title is possessed with the transfer of the warehouse receipts. [fol. 79] After the buyers have acquired the cotton, it is

usually allowed to remain in the warehouse where it is until time to ship. Immediately after the cotton is bought, it is then resampled and, as a rule, another and more strict classification made, when the cotton is blocked out for shipment immediately, or some later date, on orders calling for that particular staple and grade. Particular bales are rejected on the seller for replacement or redemption or adjustment.

In these purchases, as stated hereinbefore, some bales may be of a different grade, color or staple and not suitable for shipment on orders, then had. This cotton is frequently sold to other local buyers, at a possible loss, and it is this cotton which constitutes the "overs", the 278 bales in the case of Murff and the 165 bales with B. F. Oliver & Company.

As stated above the resale of this cotton frequently is an unprofitable transaction and it is the desire of every buyer to make his purchases coincide as nearly as possible to the orders in hand—hence the small amount of local or intrastate cotton.

As stated before, the cotton handled by these buyers is stored in the compress nearest (as a rule) to the point of ginning. Shipments against any one order are not necessarily concentrated in one press. A buyer having an order for a certain number of bales of cotton of a particular class will fill that order from whatever compress or compresses [fol. 80] he may have cotton of that class then stored.

In order that some idea may be had of the way in which cotton is concentrated in the compresses and the time it is held before being shipped, there is set forth below as determined from the records of the Federal Compress & Warehouse Company, Clarksdale, Mississippi, a table showing the total receipts and shipments for each month, accumulated total of receipts and shipments to the end of each month, and the stock of cotton on hand as at the end of each month for the period of seventeen months, beginning August 1, 1929 and ending December 31, 1930:

Fiscal Year Ending July 31, 1930

	Receipts for month	Total receipts to date shown	Shipments for *for* month	Total shipments to date shown	Stock on hand at date shown
July 31	....	....	....	....	4,187
Aug. 31	3,502	3,502	1,531	1,531	6,158
Sep. 30	56,103	59,605	11,985	13,415	40,377
Oct. 31	66,036	125,641	34,898	48,313	81,515
Nov. 30	26,321	151,962	37,944	86,257	69,892
Dec. 31	17,124	169,086	22,683	108,940	64,333
Jan. 31	9,393	178,479	33,835	142,775	39,891
Feb. 28	7,475	185,954	11,867	154,642	35,499
Mch. 31	3,757	189,711	7,797	162,439	31,459
Apr. 30	1,639	191,350	6,846	169,385	26,152
May 31	992	192,242	6,784	176,179	20,250
[fol. 81]					
June 30	593	192,835	2,531	179,710	17,312
July 31	186	193,021	2,483	182,193	15,015

Period August 1 to December 31, 1930

	Receipts for month	Total receipts to date shown	Shipments for *for* month	Total shipments to date shown	Stock on hand at date shown
July 31	....	....	....	....	15,015
Aug. 31	1,474	1,474	1,979	1,979	14,510
Sep. 30	23,865	25,339	3,161	5,140	35,214
Oct. 31	47,529	72,868	16,110	21,250	66,633
Nov. 30	23,413	96,281	15,285	37,535	73,761
Dec. 31	9,657	105,938	13,204	50,739	70,214

These figures clearly demonstrate that the cotton is largely put into storage during the months of September to January inclusive, but that the withdrawals are more gradual—as the mills and exporters have need for the cotton, it is shipped out to them.

For instance, to December 31, at the present year, there has been stored at Clarksdale, 105,938 bales of cotton, but there has been shipped to this date only 50,739 bales, leaving on hand 70,214 bales.

This balance of 70,214 bales will not likely all be shipped even by September 1, 1931, there always being a small volume on hand when the new crop starts to come in.

[fol. 82] It is further stated that the ownership of the 70,214 bales of cotton, now in this press, is varied—some of the cotton is still owned by the original producers; some is owned by scalpers and speculative buyers; some by the buyers who are shippers; some by brokers, and some by mills or consumers awaiting their call. As to when it will move, that depends altogether on the future requirements of the businesses of the many and varied owners of the cotton.

Cotton is sometimes, though rarely, allowed to remain in a compress for years. Again it is shipped to a press and immediately reshipped on some order.

The purpose and sole purpose of a compress and storage plant is to provide a conveniently located concentration depot, close to rail or water transportation where the cotton may be safely stored under bond, protected and insured against fire loss and other hazards, until such time as it is to be shipped to some point of consumption of export, and then compressed for shipment.

The extent to which this is true is shown by the following excerpt from Table 21, Dept. of Commerce Bulletin #167, "Cotton Production and Distribution Season of 1929-1930", which shows the monthly consumption of cotton, the amount held in mills awaiting manufacture and the amount still in public storage and at compresses:

[fol. 83]

	Monthly consumption	In storage at mills	In storage at compress & warehouses
"August, 1929	558,754	808,989	1,382,226
September	545,834	790,772	3,208,546
October	639,759	1,355,998	5,296,077
November	541,153	1,655,071	5,812,658
December	452,685	1,841,079	5,898,596
January, 1930	576,160	1,825,793	5,404,761
February	494,396	1,806,040	4,858,243
March	507,646	1,758,171	4,198,077
April	531,911	1,662,215	3,637,046
May	473,284	1,527,853	3,379,414
June	405,236	1,356,664	3,105,226
July	379,022	1,183,007	2,877,422"
Average	508,820	1,465,138	4,088,191

from which it will be observed that the mills carried an average of less than three month's supply of cotton at their establishments which at September 1929, fell to six weeks supply; whereas there was an average of eight month's supply in public storage throughout the entire period, and at some times as much as eleven month's supply.

Trusting that the foregoing constitutes the information desired, it is,

Respectfully submitted.

Jos. F. Ellis, Certified Public Accountant.

Clarksdale, Mississippi, December 31, 1930.

[fols. 84-135] [File endorsement omitted.]

[fol. 136] In United States District Court

[Title omitted]

Order Joining Parties Plaintiff—Filed Feb. 24, 1931

In this cause, it appearing to the Court, by consent of all parties, that the hereinafter named Cotton Buyers, being members of the same class as the plaintiffs named in the original bill of complaint herein, may be parties hereto, it is therefore, accordingly,

Ordered, adjudged and decreed that Humphrey & Company, Incorporated, a Corporation, J. C. Lore & Company, Incorporated, a Corporation, W. G. Humphrey, doing business individually and Stanley Henshaw Company, be and they are hereby made parties to this cause, as parties plaintiffs herein, with all of the rights and privileges as if originally named in the original Bill of Complaint herein process heretofore or herea-ter issued or proceedings herein done shall, as to the said named Cotton Buyers, be effective as if the said parties were original parties plaintiffs herein.

Ordered, adjudged and decreed by consent of the plaintiffs and defendants herein on this the 21st day of February, [fol. 137] A. D. 1931.

E. R. Holmes, Judge, etc.

O. K.

Geo. T. Mitchell, by Forrest B. Jackson, Assistant Attorney General.

O. K.

E. W. Smith, of Counsel for Plaintiffs.

[File endorsement omitted.]

[fol. 138] In United States District Court

[Title omitted]

Final Decree—Filed Feb. 24, 1931

This cause, by consent and upon a written stipulation as to the facts, came on to be further heard in the City of New Orleans, Parish of Orleans, State of Louisiana, before the Hon. Rufus E. Foster, Circuit Judge for the Fifth Circuit Court of Appeals; Hon. Edwin R. Holmes, United States District Judge in and for the Southern District of Mississippi, sitting by designation in and for the Northern Dstrict of Mississippi; Hon. Wayne G. Borah, United States District Judge in and for the Eastern District of Louisiana, a Court composed in accordance with the Revised Statutes, Section 718, and was argued by Counsel; and therefore, upon consideration thereof, it was ordered, [fol. 139] adjudged and decreed as follows:

That the preliminary injunction heretofore issued herein on the 29th day of November 1930 be and the same is hereby perpetuated, and Section 56 of Chapter 88 of the Laws of the State of Mississippi of 1930 be and the same is hereby declared inapplicable to interstate business and inapplicable insofar as the same undertakes to levy a privilege tax on the Plaintiffs herein, whom the Court finds to be engaged solely in interstate business, and further finds that to construe said statute as applicable to an interstate busi-

ness, such as the plaintiffs are engaged in would be in violation of the Constitution of the United States, and a burden on interstate commerce.

The Court finds the following facts, to-wit:

I

Plaintiffs are, and have been, engaged in the business of what is commonly known as cotton buyers and shippers. The Plaintiffs are all actively engaged in purchasing, selling, and shipping cotton upon the market for cotton, as hereinafter set forth, which is now and has been for many years in the past maintained in the City of Clarksdale, Miss. They are likewise engaged in buying, selling, and shipping cotton upon the other markets maintained in the Mississippi Delta, hereinafter mentioned and described, at Greenwood, Mississippi, Cleveland, Mississippi, Indianola, [fol. 140] Mississippi, Greenville, Mississippi, Yazoo City, Mississippi, Belzon, Mississippi, and Vicksburg, Mississippi; and plaintiffs business under the conditions hereinafter stated as apertaining particularly to the cotton market maintained in Clarksdale, Mississippi, likewise appertaining, in all essential features, to the other markets herein mentioned, and conditions described herein with reference to the said market at Clarksdale, Mississippi, are illustrative of the general condition in the cotton business of all of said markets.

II

The Mississippi Delta, an alluvial body of land located within the confines of the State of Mississippi, comprises about six thousand six hundred fifty square miles; it is bounded on the north by the northern boundary of the state, and extends along the western boundary of said state, in a southerly direction, for approximately one hundred ninety miles, the western boundary thereof being the Mississippi River. Its width varies from a few yards to approximately fifty miles. The said Mississippi Delta was formed by the acton of the Mississippi River in overflowing the same, and gradually building it up to a height at which it became susceptible of cultivation. The character of the soil in said Mississippi Delta makes it peculiarly adaptable

to the growing of what is commonly known as Delta-type, [fol. 141] long staple cotton, which is a cotton, and a peculiar type of cotton, recognized throughout the world in the cotton trade as being of a superior type, character, and strength.

Clarksdale, Mississippi, is located in the heart of said Mississippi Delta about seventy miles south of the northern boundary line of said State, and about fifteen miles east of the Mississippi River. The said Mississippi Delta is exclusively an agricultural community, and its principal crop is that of said long staple cotton. It produces annually a crop of approximately seven hundred thousand bales, and said cotton is the only product which is raised by the agriculturalists located in said Mississippi Delta, and which is sold upon the open market, and is the source from which is produced the cash revenue out of which practically the entire populace of said Mississippi Delta derives its livelihood.

The said cotton, when it ripens in the field, is picked by hand, put through a ginnery, by the process of which machine the lint is removed from the seed, and the lint cotton (in which plaintiffs deal exclusively as hereinafter shown) is wrapped and tied into bales weighing approximately five hundred pounds each. A bale of cotton, when wrapped and tied at the gin, is approximately five feet in length, three and one-half feet in width, and four and one-fourth feet in height.

[fol. 142] By general and uniform custom, bales of cotton from the gin are transported by rail or otherwise, as hereinafter described, to compresses. A compress is a combination storage warehouse and plant equipped with machinery designed to press bales of cotton, under extremely high pressure, for the purpose of reducing its size. A bale, after compression, is only about eighteen inches thick, the purpose of compression being that the railroads and carriers by water in interstate and foreign commerce, as hereinafter described, are enabled to load into cars and ships, for such carriage, approximately three times as much cotton after compression as otherwise would be possible. Approximately twenty-five percent of the cotton which is bought and sold upon said market in Clarksdale, and is transported to the compresses by automobile, truck, or wagon, and delivered by that means to said compresses.

Approximately seventy-five per cent of said cotton is transported to said compresses by rail over the lines of the Yazoo & Mississippi Valley Railroad Company, a common carrier engaged in interstate commerce, and which is the only such common carrier doing business at said market.

At Clarksdale, there are two compresses owned and operated by a corporation existing under the Laws of the State of Delaware, to-wit: The Federal Compress & Warehouse Company. Said Federal Compress and Warehouse Company has, with reference — both and each of said compresses maintained at Clarksdale, complied with all the [fol. 143] terms and provisions of an act of Congress, the short title of which is the "United States Warehouse Act", being Chapter 10, Title 7, U. S. C. A. The said Federal Compress and Warehouse Company complied with the terms and provisions of the said "United States Warehouse Act" for the reason that all of said cotton stored in the said compresses and/or warehouses at Clarksdale, Mississippi, and handled in the manner above described was and is cotton stored and handled therein for interstate and/or foreign commerce, and the power of Congress to affect, by provisions of its said act, the said cotton so handled and stored arises only from the fact, that said cotton and all of it is stored and handled for interstate and foreign commerce, and Congress, in exercising the power granted it by said Article 1, Section 3, of the Constitution of the United States, over the said cotton, has thereby reserved to itself exclusive jurisdiction, power, and control thereof, and divested the State of Mississippi of any power, if any it might have had, to control and/or regulate the buying, selling and/or shipping of said cotton.

When cotton is delivered to said compresses, the said Federal Compress & Warehouse Company issues to the owner thereof warehouse receipts, which receipts comply in all things with the terms and provisions of said Act of Congress. Said cotton is universally sold upon the market [fol. 144] by transfer and delivery of said warehouse receipts in accordance with the terms of said Act of Congress, and actual samples taken from said bales of cotton; said warehouse receipts being the evidence of the ownership of such cotton.

At Clarksdale, there exists an active market for the purchase and sale of cotton between farmers raising said cot-

ton and plaintiffs and others engaged in like business, who are purchasing the same with the intention and purpose of selling and transporting same in interstate and foreign commerce, which is and was and has been a universal custom and course of business for more than twenty years past. The price at which said cotton is sold upon said market at Clarksdale, however, is determined by the value of such cotton upon certain cotton exchanges maintained, respectively, in the Cities of New Orleans, Louisiana, Chicago, Illinois, and New York, New York; and there are maintained, in the City of Clarksdale, Mississippi, offices of brokers who receive daily by wire, for periods of approximately five hours each day, continuous quotations from such exchanges which fix and determine the price at which cotton is sold upon said Clarksdale market. All of said cotton, however, is bought, by plaintiffs with the uniform purpose and intention, except the "overs" hereinafter mentioned, (which is and has been the universal course of business) to trans- [fol. 145] port the same in interstate and foreign commerce to the mills located in the states upon the Atlantic seaboard, to-wit: Georgia, South Carolina, North Carolina, and Tennessee; and the mills of the New England States, to-wit: Massachusetts, Rhode Island, and Connecticut; and the mills of foreign countries. None of said cotton is spun or utilized within the confines of the State of Mississippi, or sold to or purchased by any consumer within the confines of the State of Mississippi.

Approximately seventy-five per cent of said cotton is delivered by rail to said compresses at Clarksdale, and upon the delivery of such cotton to the said carrier by rail at points outlying said City of Clarksdale, said cotton thereupon is placed in and thereafter remains in the channels of interstate commerce. The said carrier transports by rail the said cotton to the said compress at Clarksdale, and it is there concentrated merely for the purpose of compression and for the purpose of awaiting the determination of its final point of destination outside the State of Mississippi. When the destination of such cotton is determined, the said carrier loads the same out on instructions of the then owner, after having the said cotton compressed, and charges the through freight-rate from the point of origin to the point of destination outside of the State of Mississippi, instead of charging the combined rate for carriage in intrastate com-

merce from the point of origin to Clarksdale, plus the charge for carriage in interstate commerce from Clarksdale to the [fol. 146] point of destination. As for instance: the rate for the carriage in intrastate commerce from Sumner, Mississippi, to Clarksdale, Mississippi, a distance of approximately twenty miles, of an uncompressed bale of cotton is $1.28 per hundred pounds. The through rate for the carriage of a compressed bale of cotton from Clarksdale, Mississippi, to Fall River, Massachusetts, is $1.28 per hundred pounds. The said carrier, instead of charging the combined rate above outlined for carriage from Sumner, Mississippi, to Fall River, Massachusetts, charges the through-rate, which is the intermediate rate, as if there had been no interruption of shipment from Sumner, Mississippi, to Fall River, Massachusetts. The said charges are made by said carriers in accordance with the regulations prescribed by the Interstate Commerce Commission in pursuance of the act of Congress creating said commission and the several amendments thereto.

The general and uniform custom and course of business in handling said cotton upon said market is had and done in the following manner:

The farmer causes warehouse receipts, when the cotton is delivered to the compress, to be issued and delivered either directly to himself or his agent, commonly called a cotton factor. Upon the Clarksdale market, there are approximately twenty-five buyers and shippers who are engaged in the sole business of buying, selling, and shipping cotton in interstate and foreign commerce. The farmer or [fol. 147] the factor causes the actual bales of cotton to be sampled, and the cotton is sold to the plaintiffs and other buyers, sellers, and shippers upon said market, upon the basis disclosed by the character of the samples of said cotton, and by endorsement and delivery of the said cotton receipts evidencing the ownership of the same, the price therefor being governed, by the markets in New York, Chicago and New Orleans. It is uniformly known and understood by the farmer, cotton factor, and the buyer that the buyer is purchasing said cotton solely for the purpose of causing the same to be transported by rail and/or water to said points in the United States and foreign countries where mills convert said cotton into textile products as aforesaid. No cotton that is bought and/or sold upon the

Clarksdale market is utilized in the State of Mississippi, but all of said cotton, as aforesaid, is transported for consumption in interstate and foreign commerce.

The general and uniform custom among buyers, shipper, and sellers, as well as the general course of business is that a buyer enters into a contract for either the future or immediate delivery of a certain number of bales of cotton of a certain class, grade, and staple, obligating himself by such contract to deliver to a mill in a foreign state or country such cotton at a given price. Thereupon, such buyer will [fol. 148] go upon the said market at Clarksdale, and purchase cotton of the kind and character which he is obligated to his customer to deliver, and will cause the delivery of said cotton in interstate and/or foreign commerce in accordance with the terms of his contract. A very small proportion of the cotton purchased by shippers, and cotton buyers (not exceeding ten per cent) is bought when no contract for the sale thereof exists as hereinabove alleged, but, in such cases, it is bought with the sole anticipation and intention on the part of the buyer (which intention is fully known both to the buyer, farmer, and/or factor) to procure a sale of said cotton to some foreign cotton mill or foreign cotton merchant, and to cause the same to be transported in interstate and/or foreign commerce, as aforesaid, at such time as market conditions will justify. Plaintiffs have engaged in the business of buying and selling cotton in the manner aforesaid upon the markets hereinabove described for periods ranging from five to more than twenty years. The business of plaintiffs is commonly known as that either of a cotton buyer, cotton shipper, or words of like import.

In the purchase of cotton by the plaintiffs as above set forth a small proportion of the cotton was purchased varying from one percent to ten percent constituting what is known in the cotton trade as "overs or cotton which does not fit" said overs arising from reclassification, rejections [fol. 149] and preparation. As an incident to the purchase and shipment of this cotton by the plaintiffs to its customers situated in foreign states and countries, the plaintiffs sell locally this small percentage of cotton for which they have no use, but which said latter cotton is eventually shipped out of the State of Mississippi by other cotton buy-

ers of the same class as plaintiffs for delivery on orders which they may have for cotton of this particular grade, type or staple. Other and additional facts are shown by a stipulation entered into by the parties and filed herein.

Under the above and foregoing facts plaintiffs are engaged in interstate commerce, and the State of Mississippi being unauthorized to levy a privilege tax on the privilege of engaging in said business, notwithstanding by its duly constituted officers is threatening and undertaking to burden and regulate interstate commerce in contravention of the Commerce Clause of the Constitution of the United States, and therefore the said Act, as its officers are construing and attempting to enforce the same insofar as it undertakes to exact a privilege license from the plaintiffs so engaged in the business aforesaid, is unconstitutional and void.

The costs are hereby taxed against the Defendants.

[fol. 150] Ordered, adjudged and decreed on this the 21st day of February, 1931.

Rufus E. Foster, Circuit Judge. E. R. Holmes, District Judge.. Wayne G. Borah, District Judge.

[File endorsement omitted.]

[fol. 151] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL—Filed March 13, 1931

To the Honorable Rufus E. Foster, Circuit Judge; Wayne G. Borah and Edwin R. Holmes, District Judges, composing said Court:

Now come W. L. Matthews, Sheriff and Ex Officio Tax Collector of Coahoma County, Mississippi, Lester C. Franklin, H. H. Casteel and Webb Walley, composing the State Tax Commission of Mississippi, defendants in the above styled and numbered cause, and conceiving themselves aggrieved by the order made and entered by the above named Court in the above entitled cause, on the 21st, day of February, 1931, wherein among other things, said

Court, composed of Judge Rufus E. Foster, Circuit Judge, Judge Wayne G. Borah and Judge Edwin R. Holmes, District Judges, under Section 266 of the United States Judicial Code, and Section 380, Title 28, United States Code, granted the plaintiff's application for a permanent injunction in said cause, do hereby appeal to the Supreme Court of the United States from said final order and [fol. 152] decree, and especially that portion of it granting the plaintiffs' application for a permanent injunction, all of which reasons are set forth in the assignment of errors which is filed herewith.

Defendants further show unto the Court that the above entitled cause is a suit against the State of Mississippi and its officers, agents and employees, and that, therefore, under the law, no bond is required for an appeal by the State from said final order and decree. In view of the fact that defendants will sustain irreparable harm and damage by reason of said Court granting plaintiffs' application for said permanent injunction in said cause, these defendants pray that this their petition for appeal may be allowed.

Defendants further pray that a transcript of record proceedings and papers upon which said order was made, duly authenticated, may be sent to the Supreme Court of the United States, at Washington, D. C.

Dated this the 28th day of February, A. D., 1931.

Geo. T. Mitchell, Attorney General, by J. A. Lauderdale, Assistant Attorney General, Attorney for Defendants.

[File endorsement omitted.]

[fol. 153] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING APPEAL—Filed March 20, 1931

This day this cause came on to be heard on the application of the defendants in the above entitled cause for an appeal to the Supreme Court of the United States from the final decree rendered in this cause, by three Judges, grant-

ing the plaintiffs' application for a permanent injunction on the 21st day of February, 1931.

It is ordered, adjudged and decreed that said appeal be and is hereby allowed, and, it appearing to the Court that this suit is a suit against the State of Mississippi, it is ordered, adjudged and decreed that pending the appeal from the said decree in said cause to the Supreme Court of the United States, an appeal bond shall not be, and is not hereby required.

Ordered, adjudged and decreed, this the 28th day of February, 1931.

Rufus E. Foster, Circuit Judge. E. R. Holmes, Wayne G. Borah, District Judges.

[fol. 154] [File endorsement omitted.]

[fol. 155] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENTS OF ERROR—Filed March 13, 1931

Now come defendants in the above styled cause by George T. Mitchell, Attorney General of the State of Mississippi, and file the following Assignments of Error upon which they will rely on their appeal from the decree made by this court on the 21st day of February, 1931, in the above styled cause:

1. The court erred in overruling the motion to dismiss the original bill for the following reasons, to-wit:

(a) The court was without jurisdiction because there is no equity on the face of the bill.

(b) The court was without jurisdiction because complainants have a plain, ad-quate and speedy remedy at law.

(c) The court was without jurisdiction because the amount in controversy is less than $3,000.00.

(d) The court was without jurisdiction because Section 56, Chapter 88, Laws of 1930 does not contravene any pro-

[fols. 156-159] vision in the Constitution of the United States.

(e) Because the court was without jurisdiction to enjoin a sover-ign state or state officials from enforcing a state statute which does not violate the Federal Constitution.

2. The court erred in granting a preliminary injunction for the same reasons that it erred in overruling the motion to dismiss the bill.

3. The court erred in granting a permanent injunction on the final hearing of said cause:

(a) Because Section 56, Chapter 88, Laws of 1930 does not contravene any provision in the Constitution of the United States.

(b) Because under the facts of this case plaintiffs are not engaged exclusively in interstate commerce.

Respectfully submitted.
Geo. T. Mitchell, Attorney General, by J. A. Lauderdale, Assistant Attorney General, Attorney for Defendants.

[File endorsement omitted.]

[fol. 160] IN THE SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON

I

The court erred in overruling the motion to dismiss the original bill for the following reasons, to-wit:

(1) The court was without jurisdiction because there is no equity on the face of the bill.

(2) The court was without jurisdiction because complainants have a plain, adequate and speedy remedy at law.

(3) The court was without jurisdiction because the amount in controversy is less than $3,000.00.

(4) The court was without jurisdiction because Section 56, Chapter 88, Laws of 1930 does not contravene any provision in the Constitution of the United States.

[fol. 161] (5) Because the court was without jurisdiction to enjoin a sovereign state or state officials from enforcing a state statute which does not violate the Federal Constitution.

II

The court erred in granting a preliminary injunction for the same reasons that it erred in overruling the motion to dismiss the bill.

III

The court erred in granting a permanent injunction on the final hearing of said cause:

(1) Because Section 56, Chapter 88, Laws of 1930 does not contravene any provision in the Constitution of the United States.

(2) Because under the facts of this case appellees are not engaged exclusively in interstate commerce.

Respectfully submitted.
J. A. Lauderdale, Assistant Attorney General, Attorney for Appellants.

[fols. 162 & 163] IN THE SUPREME COURT OF THE UNITED STATES

PRÆCIPE FOR TRANSCRIPT OF THE RECORD

1. Original bill of Complainants with exhibits thereto.
2. Order granting temporary injunction.
3. Motion to dismiss the original bill.
4. Order overruling the motion and granting temporary injunction.
5. Opinion of the court written by Judge Holmes on the application for issuance of temporary injunction and directing the entry of the order granting such application.
6. Answer of defendants.

7. Agreed statement of fact.
8. Order joining Humphreys and Company, et al., as plaintiffs.
9. Decree of the court granting permanent injunction.
10. Petition for appeal by defendant.
11. Assignments of error by defendants.
12. Order or decree of Honorable Rufus E. Foster, Circuit Judge, Honorable E. R. Holmes and Honorable Wayne G. Borah, District Judges, granting the appeal.

Geo. T. Mitchell, Attorney General; J. A. Lauderdale, Assistant Attorney General, Attorneys for Appellants. Edward W. Smith, J. L. Roberson, & Sam C. Cook, Attorneys for Appellees.

Endorsed on cover: File No. 35,889. N. Mississippi D. C. U. S. Term No. 84. W. L. Mathews et al., appellants, vs. J. F. Rodgers et al. Filed May 15, 1931. File No. 35,889.

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JUN 8 1931

CHARLES ELMORE CROPL
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

NO. [redacted] 84

W. L. MATTHEWS, ET. AL., Appellants

VS.

J. F. RODGERS, ET. AL., Appellees

STATEMENT AS TO JURISDICTION ON APPEAL.

GEO. T. MITCHELL,
Attorney General,

J. A. LAUDERDALE,
Assistant Attorney General,
Attorneys for Appellants.

In The Supreme Court of The United States
OCTOBER TERM

NO. 967

W. L. MATTHEWS, ET. AL., Appellants
VS.
J. F. RODGERS, ET. AL., Appellees

STATEMENT AS TO JURISDICTION ON APPEAL.

MAY IT PLEASE THE COURT:

The appellants in support of the jurisdiction of this Court to review the above styled cause on appeal, respectfully present:

A.
STATUTORY PROVISION SUSTAINING JURISDICTION.

The Act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 936, 938, provides that Sections 238 and 266 of the Judicial Code are amended to read as follows:

> "Section 238. A direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following sections and not otherwise."
>
> "Section 266. No interlocutory injunction suspending or restraining the enforcement, operation or execution of any statute of a State by restraining the action of any officer of such State

in the enforcement or execution of such statute, or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such State, shall be issued or granted by any justice of the Supreme Court, or by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a justice of the Supreme Court or a circuit judge, and the other two may be either circuit or district judges, and unless a majority of said three judges shall concur in granting such application. Whenever such application as aforesaid is presented to a justice of the Supreme Court, or to a judge, he shall immediately call to his assistance to hear and determine the application two other judges; Provided, however, that one of such three judges shall be a justice of the Supreme Court, or a circuit judge Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the governor and to the attorney general of the State, and to such other persons as may be defendants in the suit: Provided, that if of opinion that irreparable loss or damage would result to the complainant unless a temporary restraining order is granted, any justice of the Supreme Court or any circuit or district judge, may grant such temporary restraining order at any time before such hearing and determination of the application for an interlocutory injunction, but such temporary restraining order shall remain

in force only until the hearing and determination of the application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case. It is further provided that if before the final hearing of such application a suit shall have been brought in a court of the State having jurisdiction thereof under the laws of such State, to enforce such statute or order, accompanied by a stay in such State court, all proceedings in any court of the United States to restrain the execution of such statute or order shall be stayed pending the final determination of such suit in the courts of the State. Such stay may be vacated upon proof made after hearing, and notice of ten days served upon the attorney general of the State, that the suit in the State Courts is not being prosecuted with diligence and good faith. The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the district court; and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit."

B.

DATE OF DECREE AND DATE OF APPLICATION FOR APPEAL.

The decree sought to be reviewed was entered on the 21st day of February, 1931.

The application for appeal was presented on the 28th day of February, 1931.

C.

NATURE OF CASE AND RULING BELOW.

This is an appeal from a final decree of the United States District Court Northern District of Mississippi, three judges sitting in said cause wherein the appellees filed a bill of complaint against the appellants to enjoin them from enforcing Section 56, Chapter 88, Laws of 1930, which reads as follows, to-wit:

> "Cotton Buyers.—Every person engaged in the business of buying or selling cotton for himself shall pay a privilege tax of one hundred ($100.00) dollars; but, where a cotton buyer only buys cotton from one gin in only one county or buys from the producers in only one municipality, said privilege tax is twenty-five ($25.00) dollars; the license must be issued in his name, and may be paid on or before the first day of September for a full year; only the municipality of his residence can collect a municipal privilege tax of him. Every individual, firm, partnership or corporation engaged in the business of buying or selling cotton shall take out in his or their name a state privilege tax of twenty-five ($25.00) dollars for every employee engaged in their business as buyer or seller, on or before the first day of September; such privilege tax shall authorize the buying or selling cotton by its bearer; and it shall be unlawful for any employee to buy or sell cotton without a privilege tax in his possession, issued in the name of his employer. Such license cannot be issued for less than a year."

It is alleged in said bill that appellees buy cotton in the State of Mississippi, sell it outside the State of Mississippi, and said appellees under the facts stated in the bill are engaged solely and exclusively in interstate commerce, and that said statute hereinbefore quoted levies a tax on interstate commerce. Said bill further alleges that the amount in controversy exceeds the sum of $3,000.00 exclusive of interest and cost and other material facts in reference to the jurisdiction.

The basis for the relief prayed for is the claim that the above quoted act of the legislature of the State of Mississippi is unconstitutional and void because:

First: Said act violates the provisions of Article 1, Section 8, Clause 3 of the Constitution of the United States in that it attempts to impose a license, place a burden, interfere with, obstruct and/or regulate interstate commerce.

Second: Said act is an attempted usurpation of the powers delegated to the Congress of the United States by the Constitution of the United States.

After hearing said cause the said Court, composed of Honorable Rufus E. Foster, Circuit Judge, Honorable Edwin R. Holmes and Honorable Wayne G. Borah, District Judges, held that said act as applied to appellee violated the section of the Constitution of the United States hereinbefore named, as appellee was engaged solely in interstate commerce in the State of Mississippi, and enjoined the appellants from enforcing said act.

D.

CASES BELIEVED TO SUSTAIN JURISDICTION

The following decisions of this Court are believed to sustain jurisdiction of this appeal:

Moore v. Fidelity & Deposit Co., 272 U. S. 317, 320-321; *Smith v. Wilson*, 273 U. S. 388; *Ex Parte Butler*, 271 U. S. 461, 465; *State Board of Tax Commissioners v. Jackson*, No. 183, October Term 1930.

We respectfully submit that this Court has jurisdiction of the appeal by virtue of Sections 238 and 266 of the Judicial Code, as amended by the Act of February 13, 1925.

Respectfully submitted,

GEO. T. MITCHELL,
Attorney General,

J. A. LAUDERDALE,
Assistant Attorney General,
Attorneys for Appellants.

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CHARLES

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

NO. 84

W. L. MATTHEWS, ET AL, Appellants,
VS.
J. F. RODGERS, ET AL, Appellees.

BRIEF FOR APPELLANTS.

GEO. T. MITCHELL,
Attorney General,

J. A. LAUDERDALE,
Assistant Attorney General,

Attorneys for Appellants.

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In The Supreme Court of The United States

OCTOBER TERM, 1931

NO. 84

W. L. MATTHEWS, ET AL, Appellants,
VS.
J. F. RODGERS, ET AL, Appellees.

BRIEF FOR APPELLANTS.

STATEMENT OF THE CASE.

Appellees, J. F. Rodgers, and others, filed their bill in the District Court of the United States for the Northern District of Mississippi, attacking in so far as appellees' business is concerned, the constitutionality of Section 56, Chapter 88, Laws of Mississippi, 1930.

A three-judge court was organized as provided in Sections 238 and 266 of the Judicial Code, as amended by the Act of February 13, 1925, Chapter 229, Section 1.

The bill sets out in detail appellee's method of doing business and also the method of marketing long staple cotton in the Mississippi Delta. (See Rec. pp. 4-10.)

The bill also alleged the usual judicial facts, that is, that unless an injunction issued a multiplicity of suits would

be brought against appellees. Second, that the amount involved exceeded $3,000.00. Third, that they had no adequate remedy at law. Fourth, that said Section 56, Chapter 88, Laws of 1930 was unconstitutional. However, there is no contention that said statute is unconstitutional, except when applied to persons engaged exclusively in interstate commerce. There is no contention that it is unconstitutional when applied to persons engaged in intrastate business.

A temporary restraining order was granted by Honorable E. R. Holmes, District Judge, on September 20th, 1930.

When the cause came on for hearing on motion for preliminary injunction, appellants here filed a motion to dismiss the bill. The grounds for said motion are set out in the record at page 19.

This motion was overruled, and temporary injunction granted. Appellants then filed an answer to the original bill. (See Rec. pp. 22-28.)

When the cause came on for hearing, counsel for both parties filed an agreed statement of fact. These facts appear in the record pages 28-43.

The court held that appellants were engaged in interstate business and that said statute was "inapplicable in so far as the same undertakes to levy a privilege tax on the plaintiffs herein whom the court finds to be engaged solely in interstate commerce, and further finds that to construe said statute as applying to an interstate business such as

the plaintiffs are engaged in would be in violation of the Constitution of the United States and a burden on interstate commerce." (Rec. p. 43.) The finding of fact by the court is in the record pages 44-50.

The agreed statement of facts and the facts found to be true by the court show that appellees were engaged in buying and selling cotton; that they were resident citizens of and doing business in Mississippi; that 90 per cent or more of the cotton bought by them was sold in interstate commerce; in other words, that 90 per cent or more of the cotton bought by them was sold to persons and corporations living outside the State of Mississippi; that 10 per cent or less of the cotton purchased by them was sold to persons residing in Mississippi. In other words, abo[redacted] per cent of the business was interstate commerce, and [redacted] per cent or less intrastate business.

POINTS RELIED ON FOR REVERSAL OF THIS CAUSE.

POINT I.

The court below was without jurisdiction for the following reasons, to-wit:

(a) Because there is no equity on the face of the bill.

(b) Because plaintiffs have a plain, adequate and speedy remedy at law.

(c) Because the amount in controversy is less than $3,000.00.

(d) Because Section 56, Chapter 88, Laws of 1930 does not contravene any provision in the Constitution of the United States.

(e) Because a Federal Court cannot enjoin a sovereign state or state officials from enforcing a state statute which does not violate the Federal Constitution.

POINT II.

The decree of the court below should be reversed for the following reasons:

(a) Because Section 56, Chapter 88, Laws of 1930 does not contravene any provision in the Constitution of the United States.

(b) Because under the facts found by the court in this case plaintiffs are not engaged exclusively in interstate commerce, and the tax would apply to the intrastate business.

BRIEF AND ARGUMENT

POINT I.

A.

The Court Was Without Jurisdiction Because There Is No Equity On the Face of the Bill.

The averment of the possibility of the multiplicity of

suits is not sufficient to invoke equity jurisdiction.

As a ground for equity jurisdiction, plaintiffs allege the possibility of the multiplicity of suits. This may be a remote possibility, but is not a probability. A great number of suits over the small amount involved in these various claims would be as burdensome and as unprofitable to the State as it would be to the plaintiffs. The fact is there could be no multiplicity of suits as to any one of the plaintiffs in this case. There could be only one civil suit for the collection of the tax, and one criminal case for failure to pay the tax. A large number of plaintiffs cannot pool their rights in order to make a multiplicity of suits.

Even then, there is no probability that all of the plaintiffs would be sued as the same facts and same principles of law would be involved in each and every one of them, and it would be worse than foolishness for the State to institute three or four hundred suits before the principles of law were settled.

In *Boise Artesian Hot & Cold Water Co., Ltd., vs Boise City*, 213 U. S. 276, the Supreme Court of the United States held as follows:

> "Nor do we think that there is any danger of a multiplicity of suits in the sense that would authorize the issuance of an injunction. One suit only has been brought, and that by direction of the city council. It remains pending, and when it reaches judgment it will determine finally every question in dispute between the parties. There is no need of any other suit except to prevent the

running of the statute of limitations, and nothing to indicate that any will be brought. Where the multiplicity of suits to be feared consists in repetitions of suits by the same person against the plaintiff for causes of action arising out of the same facts and legal principles, a court of equity ought not to interfere upon that ground unless it is clearly necessary to protect the plaintiff from continued and vexatious litigation. Something more is required than the beginning of a single action with an honest purpose to settle the rights of the parties. 1 Pom. Eq. Jur. 3rd. ed., Sec. 254."

In the case of *Francis vs. Flinn*, 118 U. S. 385, the Supreme Court held as follows:

"The whole gist of the complaint is that the defendants do not treat the plaintiff as having a right to use his vessel as a pilot boat, and have publicly so stated, and that some of the parties mentioned have been subjected to suits for their acts in piloting. But if this be so, the plaintiff has a full remedy for his alleged wrongs in the courts of law. They furnish no ground for the interposition of a court of equity. If the plaintiff has a right to pilot vessels with his boat through the pass and is wrongfully interfered with by the defendants or others, he can prosecute them for the wrong. If his vessel is arrested in its passage, without lawful warrant, he can bring the defendants before the courts to answer for their conduct. If his pilots are duly licensed, and they are hindered or prevented from the exercise of their business, both he and they have the same means of redress which are afforded to every citizen whose rights are invaded and obstructed. If the publications in the newspapers are false and in-

jurious, he can prosecute the publishers for libel. If a court of equity could interfere and use its remedy of injunction in such cases, it would draw to itself the greater part of the litigation properly belonging to courts of law.

"We think the court below should have sustained the demurrer of the defendants for want of equity in the bill."

In the case of *Dalton Adding Machine Co. vs. State Corporation Commission*, 236 U. S. 698, the Supreme Court stated the allegations of the complaint as follows:

"The appellant contends that its business in Virginia is wholly interstate. A statute of Virginia requires foreign corporations doing business there to obtain a license from the state corporation commission, to pay a fee, etc., and it is alleged that the commission threatens to take proceedings to enforce the statute and the penalties provided for disobeying it against the appellant, contrary to Article I, Section 8, of the Constitution. The appellant further alleges that it has reason to fear and fears a multiplicity of proceedings and the imposition of many fines, and that it will suffer irreparable loss from even a temporary interference with its affairs, through loss of sales and prestige, help to its competitors, and encouragement of similar proceedings in other states."

The Court held as follows:

"We agree with the district court in its conclusion and in its grounds. Like it, we leave on one side the merits of the appellant's claim of immunity, and confine ourselves to deciding that no reason is shown for anticipating the ordinary

course of the law. We also leave aside the question whether the action of the commission is or is not the action of a court protected from interference on the part of the courts of the United States. Rev. Stat., Sec. 720. *Brentis vs. Atlantic Coast Line Co.*, 211 U. S. 210, 226, 230, 53 L. Ed. 150, 158, 160, 29 Sup. Ct. Rep. 67. The general principle is that it is not for the courts to stop officers of this kind from performing their statutory duty for fear that they should perform it wrongly. *First Nat. Bank vs. Allbright*, 208 U. S. 548, 553, 52 L. Ed. 614, 616, 23 Sup. Ct. Rep. 349. Especially is this true in the matter of collecting taxes and license fees. *Boise Artesian Hot & Cold Water Co. vs. Boise City*, 213 U. S. 276, 53 L. Ed. 796, 29 Sup. Ct. Rep. 426. The appellant has an adequate remedy at law in its right to raise the constitutional question if proceedings are taken against it, or, it seems, to recover the money if it pays under protest. No special circumstances are shown, that we can notice, to take this case out of the ordinary rule. *Indiana Mfg. Co. vs. Koene*, 188 U. S. 681, 690, 47 L. Ed. 651, 656, 23 Sup. Ct. Rep. 452."

In the case of *Cave vs. Rudolph*, 287 Fed. 989, the Federal Court held as follows:

> "Nor does the possibility of the multiplicity of arrests and trials in such cases pending a final decision of the question avail to bring the issue within the jurisdiction of equity."

POINT I.

B

The Court Was Without Jurisdiction Because

Plaintiffs Have a Plain, Adequate and Speedy Remedy at Law.

In addition to the statutory remedies provided for the recovery of taxes illegally collected when a tax collector collects an illegal tax, the tax payer has a right of action against the tax collector for the amount of taxes paid.

In the case at bar none of the taxes have been paid. The tax payer could pay the tax under protest and give notice to the tax collector that he would sue such tax collector for a refund of the money so paid, and in this way protect all of his rights.

In the case of *Tuttle v. Everett*, 51 Miss., page 27, the Supreme Court of Mississippi held as follows:

> "It is insisted on the part of the plaintiff in error that the taxes were voluntarily paid, and for that reason cannot be recovered back from the tax collector. This would be a correct legal proposition, where the property is properly taxable, and there was a mere irregularity in the levy or collection of the tax. But where the assessment and levy of the tax is illegal and void, the tax paid to the collector may be recovered back by the tax payer from the tax collector, whilst the same remains in his hands. This is in accordance with reason, principle and authority. Blackwell in his valuable work on Tax Titles says: 'Where a county or other local corporation levy a tax which is illegal, and the citizen pays the tax to one who has a formal authority to collect it, the payment is not voluntary but compulsive, and an action will lie against the collector to recover it back, unless he has paid

it over to his superiors, in which event the action must be brought against the corporation.' Blackwell, 187 top page, 4th. ed.

"The case of *Hawkins et al v. The Board of Supervisors of Carroll County*, 50 Miss., 755, shows that the assessment and levy of the tax was unauthorized by law, and was therefore null and void. If the assessment be made in violation of law, it is a void act, the collector, in enforcing its collection, is trespasser. Blackwell on Tax Titles, 156 star page. And this doctrine is maintained in the case of *Coulson v. Harris*, 43 Miss. 751.

"In the case under consideration the tax was illegally collected by the plaintiff in error, under color of authority from the defendant in error, the tax payer, who properly recovered a judgment for the same in the court below."

In the case of *Coulson v. Harris*, 43 Miss., 728, text 750 the Supreme Court of Mississippi held as follows:

"If the trustees had authority to levy the tax, they might, no doubt, rightfully collect it, and if they had no such authority, and should attempt to coerce the payment of the tax by distress, they would be guilty of a wrong, for which a court of law would afford an adequate remedy. It is true that a court of equity will sometimes interpose to prevent a wrong, but it is done in general only where the wrong is in its nature irreparable in the modes of redress afforded by courts of common law; and that cannot be said to be the case in relation to the supposed wrong which is apprehended by the complainants.' The trustees of *Louisville v. Gwathmey & Gretsinger*, 1 *A. K. Marshall*, 412.

"If the assessment of a tax be in violation of law, it is a void act; the collector, in enforcing its collection, is a tresspasser, and the purchaser acquires no title at the sale, and in general, the taxpayer has a plain, full, adequate and complete remedy at law. In the case of *Marr v. Enlow*, 1 Yerger 452, an action of trover was brought against the tax collector for personal property, which he had seized for the purpose of enforcing the collection of a tax which had been illegally assessed. The supreme court of Tennessee held that the action would lie. And the same doctrine was maintained in the case of the county court of *Obion v. Marr*, 8 Humphrey 634; Blackwell on Tax Titles, 156."

In *Gaar, Scott & Co. v. Shannon*, 223 U. S. 468, the Supreme Court of the United States held as follows:

"Neither a statute imposing a tax, nor the execution thereunder, nor a mere demand for payment, is treated as duress. It does not necessarily follow that there will be duress of goods. Or, if there is, the citizen to avoid the consequences of the duress, may pay the money, regain the use of his property, and maintain a suit for the recovery of what has been exacted from him. The legal remedy redresses the wrong. But he has the same right to sue if he pays under compulsion of a statute whose self-executing provisions amount to duress. An act which declares that where the franchise tax is not paid by a given date, a penalty of 25 per cent shall be incurred, the license of the company shall be cancelled, and the right to sue shall be lost, operates much more as duress than a levy on a limited amount of property. Payment to

avoid such consequences is not voluntary but compulsory, and may be recovered back.... *Swift & C. & B. Co. v. United States*, 111 U. S. 29, 28 L. Ed. 343, 4 Sup. Ct. Rep. 244; *Robertson v. Frank Bros. Co.* 132 U. S. 23, 33 L. Ed. 238, 10 Sup. Ct. Rep. 5; *Oceanic Steam Nav. Co. v. Stranahan*, 214 U. S. 329, 53 L. Ed. 1018, 29 Sup. Ct. Rep. 671; *Atchison, T. & S. F. R. Co. v. O'Connor*, decided this day. (223 U. S. 280, ante, 436, 32 Sup. Ct. Rep. 216.)"

In *Atchison, T. & S. F. Co. v. O'Connor*, 223 U. S. 280 the Supreme Court of the United States held as follows:

"The other question is whether the defendant is liable to the suit. The defendant collected the money, and it is alleged that he still has it. He was notified when he received it that the plaintiff disputed his right. If he had no right, as he had not, to collect the money, his doing so in the name of the state cannot protect him. *Erskine v. Van Arsdale*, 15 Wall. 75, 21 L. E. 63. See *Poindexter v. Greenhow*, 114 U. S. 270, 29 L. Ed. 185, 5 Sup. Ct. Rep. 903, 962. It is said that the money as soon as collected, belonged to the state. Very likely it would have but for the plaintiff's claim, assuming it to remain an identified trust fund; but the plaintiff's claim was paramount to that of the state, and even if the collector of the tax were authorized to appropriate the specific money and to make himself debtor for the amount, it would be inconceivable that the state should attempt to hold him after he had been required to repay the sum."

See also *Pickard v. Pullman So. Car Co.*, 117 U. S. 934;

Swift & Company v. United States, 111 U. S. 22.

POINT I.

C

The Court Was Without Jurisdiction Because The Amount In Controversy Is Less Than $3,000.00.

The tax levied by Section 56, Chapter 88, Laws of Mississippi, 1930 is $100.00. The appellants contend that the amount of the tax is the amount in controversy. Appellees contend that the right to carry on their business as cotton buyers and shippers is worth more than $3,000.00, and that the value of the right so to do is the amount in controversy. Appellants concede that if the courts hold that the value of the right of plaintiffs to do business is the amount in controversy, then this point cannot be sustained because appellants agree that the value of the right of plaintiffs to do business is more than $3,000.00 The appellants contend that the amount in controversy is the amount of tax which is $100.00 and is, therefore, not the judicial amount.

In *Fishback v. Western Union Telegraph Co.*, 161 U. S. 96, the telegraph company sought to enjoin the collection of certain taxes. It appears from the reported case that the taxes against the telegraph company were assessed in each county. The Court held that the telegraph company could not combine the taxes in the separate counties, and unless the tax in one county was more than the jurisdictional amount, then the suit must fail.

See also *Walter v. Northeastern R. R. Co.*, 147 U. S. 370.

In *Holt v. Indiana Manufacturing Co.*, 176 U. S. 68, it is held that a suit to restrain the collection of taxes not exceeding $2,000.00 in amount, though arising under the constitution or laws of the United States, is not within the jurisdiction of the Circuit Court of the United States.

This case further holds that future taxes which may be affected by the decision cannot be included in determining the value of the matter in dispute.

In *Citizens Bank of Louisiana v. Cannon*, 164 U. S. 319, the Court held that in a suit by a bank to enjoin the collection of taxes for certain years on property claimed to be exempt, the amount of the tax being insufficient to give jurisdiction, the fact that the value of the exemption during the continuance of the charter of the bank will exceed the jurisdictional amount, will not give jurisdiction.

In the case of *Cole v. Norborne Land Drainage District*, 207 U. S. 45, the Supreme Court held that in a suit to enjoin the collection of a tax for drainage benefit on the ground of the unconstitutionality of the statute that the assessments against each of them was more than the jurisdictional amount and the suit could not be sustained.

The tax for the current year and not for future years controls in a case to enjoin the collection of a tax.

See *Citizens Bank v. Cannon*, 164 U. S. 319.

In *Turner v. Jackson Lumber Company*, 218 U. S. 685, the Supreme Court held that the amount in controversy was

the amount of taxes in dispute, and that unless this was more than the jurisdictional amount, the Court would not have jurisdiction.

In *Lion Bonding Company v. Karatz*, 262 U. S. 77, the Supreme Court held that a plaintiff who sued on his own behalf and on behalf of other persons similarly situated, that the amount in controversy was the amount claimed by each plaintiff, and not the aggregate amount.

In *Scott v. Frazier*, 253 U. S. 243, the Supreme Court held:

> "There is no allegation that the loss or injury to any complainant amounts to the sum of $3,000.00. It is well settled that in such cases as this the amount in controversy must equal the jurisdictional sum as to each complainant. *Wheless v. St. Louis*, 180 U. S. 379; *Rogers v. Hennepin Co.*, 239 U. S. 62.
>
> "In cases where, although the entire matter in dispute in the suit exceeds in value the jurisdictional limit, nevertheless, if there are several and separate interests in that sum belonging to distinct parties and constituting distinct causes of action, although actually united in one suit and growing out of the same transaction, the jurisdiction of the court cannot be maintained where such separate interests are below the jurisdictional amount.
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> *Ex parte Baltimore, etc. R. Co.*, 106 U. S. 5;
> *Adams v. Crittenden*, 106 U. S. 576;
> *Farmers Loan Co. v. Waterman*, 106 U. S. 265;
> *Schewd v. Smith*, 106 U. S. 188;
> *Elgin v. Marshall*, 106 U. S. 578;

Ogden v. Armstrong, 168 U. S. 224;
Chamberlain v. Browning, 177 U. S. 605."

In *Packard v. Banton*, 264 U. S. 140, text 142, the Supreme Court held as follows:

"Appellees insist that the district court was without jurisdiction because the matter in controversy does not exceed the value of $3,000.00. Judicial Code, Section 24, Subd. 1. The bill discloses that the enforcement of the statute, sought to be enjoined, will have the effect of materially increasing appellant's expenditures, as well as causing injury to him in other respects. The allegations, in general terms, are that the sum or value in controversy exceeds $3,000.00, which the affidavits filed in the lower court tend to support; that appellant is the owner of four motor vehicles, the income from which would be reduced, if the law be enforced, to the extent of $18.50 *each* per week; and that his business would otherwise suffer. The object of the suit is to enjoin the enforcement of the statute, and it is the value of this object thus sought to be gained that determines the amount in dispute. *Mississippi & M. R. Co. v.* Ward, 2 Black. 485; 17 L. Ed. 311; *Texas & P. R. Co. v. Kuteman*, 4 C. C. A. 503, 13 U. S. App. 99, 54 Fed. 547, 552; *Nashville C & St. L. R. Co. v. McConnell*, 82 Fed. 65, 73; *Scott v. Donald*, 165 U. S. 107, 114, 41 L. Ed. 648, 653, 17 Sup. Ct. Rep. 262; *Hutchinson v. Beckham*, 55 C. C. A. 333, 118 Fed. 399, 402; *Evenson v. Spaulding*, 9 L. R. A. (N. S.) 904, 82 C. C. A. 263, 150 Fed. 517, 520; *Hunt v. New York Cotton Exch.*, 205 U. S. 322, 336, 51 L. Ed. 821, 826, 27 Sup. Ct. Rep. 529."

In the case of *Berryman v. Board of Trustees*, 223 U. S.

334, Whitman College had a contract for a certain term of years exempting it from the payment of taxes. Afterwards the Legislature undertook to tax the property of the college. In that case the Court held that the amount of tax for one year would not control, but that the action of the Legislature in levying the tax breached the contract, and the value of the contract would control.

In the case of *Hunt v. New York Cotton Exchange*, 205 U. S. 322, the Court held that the value of the right to use the New York Cotton Exchange, and not the cost to the complainant, controlled.

I have been unable to find any case where a tax was involved that the Court did not hold that the amount of the tax in controversy was the amount to determine the jurisdiction of the Court.

In the case of *Turner v. Jackson Lumber Co.*, 159 Fed. Rep. 923, appeal dismissed in 218 U. S. 685, the plaintiff sought to enjoin the collection of certain taxes amounting to less than $2,000.00. During the pendency of the cause the land sought to be taxed sold for taxes. The Court held that the amount of the tax and not the value of the land was the amount in controversy.

In the case at bar there is only $100.00 in controversy, and as set out under the second division of this brief, the plaintiffs may pay $100.00 to the tax collector and file a suit to recover it, and if there are any constitutional rights involved, the same may be finally determined by the Supreme Court of the United States. The plaintiffs, there-

fore, have a complete and adequate remedy at law, and the amount involved is less than $3,000.00.

Plaintiffs allege that their income from their business is from $5,000.00 to $20,000.00 per annum. It certainly would not be incumbent upon them to sacrifice this business in order to escape the payment of a $100.00 tax, or in order to have the legality of the tax judicially determined.

POINT I.

D and E

The Court Was Without Jurisdiction Because Section 56, Chapter 88, Laws of 1930, Does Not Contravene Any Provision In the Constitution of the United States, and Because Injunction Will Not Lie Against A Sovereign State Or A State Official Enforcing A Valid Statute.

Complainants allege that the statute is unconstitutional, but this is based on the theory that complainants are doing an interstate business and the tax levied by said section would be a burden on and regulate interstate commerce. There is no contention that the statute would be unconstitutional when applied to a cotton buyer who did no interstate business.

Article 11 of the Constitution of the United States is as follows:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

"An injunction to restrain a state officer from enforcing a valid state statute is a suit against the state and cannot be maintained." *Poindexter v. Greenlaw*, 114 U. S. 210 29 L. Ed. 185; *Fitts v. McGehee*, 172 U. S. 516, 43 L. Ed. 535; *Arbuckle v. Blackburn*, 113 Fed. 616, 48 L. Ed. 239; Section 379, U. S. Code Ann., Section 265, J. C. Section 720, R. S.; Section 380, U. S. Code Ann., Sec. 266 J. S.; *Francis v. Flynn*, 118 U. S. 385, 30 L. Ed. 165; *Dalton Adding Machine Co. v. State Corporation Commission*, 236 U. S. 698, 59 L. Ed. 797.

In the latter case the Supreme Court of the United States held as follows:

"The appellant contends that its business in Virginia is wholly interstate. A statute of Virginia requires foreign corporations doing business there to obtain a license from the state corporation commission, to pay a fee, etc., and it is alleged that the commission threatens to take proceedings to enforce the statute and the penalties provided for disobeying it against the appellant, contrary to Article 1, Paragraph 8, of the Constitution. The appellant further alleges that it has reason to fear and fears a multiplicity of proceedings and the imposition of many fines, and that it will suffer irreparable loss from even a temporary interference with its affairs, through loss of sales and prestige, help to its competitors, and encouragement of similar proceedings in other states."

"We agree with the district court in its conclusion and in its grounds. Like it, we leave on one side the merits of the appellant's claim of immunity, and confine ourselves to deciding that no

reason is shown for anticipating the ordinary course of the law. We also leave aside the question whether the action of a court protected from interference on the part of the courts of the United States. Rev. Stat. Sec. 720. *Prentiss v. Atlantic Coast Line Co.* 211 U. S. 210, 226, 230, 53 L. Ed. 150, 158, 160, 20 Sup. Ct. Rep. 67. The general principle is that it is not for the courts to stop officers of this kind from performing their statutory duty for fear that they should perform it wrongly. *First Nat. Bank v. Albright,* 208 U. S. 548, 553, 52 L. Ed. 614, 616, 28 Sup. Ct. Rep. 349. Especially is this true in the matter of collecting taxes and license fees. *Boise Artesian Hot & Cold Water Co. v. Boise City,* 213 U. S. 276, 53 L. Ed. 796, 29 Sup. Ct. Rep. 426. The appellant has an adequate remedy at law in its right to raise the constitutional question if proceedings are taken against it, or, it seems, to recover the money if it pays under protest. No special circumstances are shown, that we can notice, to take this case out of the ordinary rule. *Indiana Mfg. Co. v. Koehne,* 188 U. S. 681, 690, 47 L. Ed. 651, 656, 23 Sup. Ct. Rep. 452."

"The interpretation of valid criminal statutes of the state is a matter within the exclusive jurisdiction of the state courts, and the Federal courts follow the interpretation of the state courts of last resort in such matters."

Central Consumers Co. v. Austin, 238 Fed. 616.

In *Hoffman Brewing Company v. M'Elligott,* 259 Fed. 525, it was held that a Federal District Attorney cannot be enjoined from instituting criminal proceedings, against

concerns manufacturing and selling non-intoxicating beer on the ground that the attorney had transcended his authority by invoking the act against non-intoxicating liquors.

In *Harkrader v. Wadley*, 43 L. Ed. 399, text 406, the Supreme Court held as follows:

> "No case can be found where an injunction against a state officer has been upheld where it was conceded that such officer was proceeding under a valid state statute. In the present case the commonwealth attorney, in the prosecution of an indictment found under a law admittedly valid, represented the state of Virginia, and the injunctions were therefore in substance injunctions against the state. In proceeding by indictment to enforce a criminal statute the state can only act by officers or attorneys, and to enjoin the latter is to enjoin the state. As was said in Re Ayres, 123 U. S. 443, 497, 931; 216, 227: 'How else can the state be forbidden by judicial process to bring actions in its name, except by constraining the conduct of its officers, its attorneys, and its agents? And if all such officers, attorneys, and agents are personally subjected to the process of the court, so as to forbid their acting in its behalf, how can it be said that the state itself is not subjected to the jurisdiction of the court as an actual and real defendant?'"

POINT II.

A and B

Section 56, Chapter 88, Laws of 1930 Does Not Contravene Any Provision of the Constitution of the United States. Under The Facts In

This Case Plaintiffs Are Not Engaged Exclusively In Interstate Commerce.

It is not contended by appellees that when Section 56, Chapter 88, Laws of 1930 is applied to persons engaged in intrastate business, said section is not unconstitutional. For a statement of fact as to the business conducted by appellees, I again call the court's attention to the finding of fact made by the court in its final decree beginning at page 44 of the record.

In *Coe v. Errol*, 116 U. S. 517, 29 L. Ed. 715, the Supreme Court held as follows:

> "When the products of the farm or the forest are collected and brought in from the surrounding country to a town or station serving as an entrepot for that particular region, whether on a river or a line of railroad, such products are not yet exports nor are they in process of exportation, nor is exportation begun until they are committed to the common carrier for transportation out of the state to the state of their destination or have started on their ultimate passage to that state. Until then it is reasonable to regard them as not only within the state of their origin, but as a part of the general mass of property of that state, subject to its jurisdiction and liable to taxation there, if not taxed by reason of their being without any discrimination, in the usual way and manner in which such property is taxed in the state."
>
> "That such goods do not cease to be part of the general mass of property in the state, subject as such, to its jurisdiction and to taxation in the usual way, until they have been shipped or enter-

ed with a common carrier for transportation to another state or have been started upon such transportation in a continuous route or journey. We think that this must be the true rule on the subject. It seems to us untenable to hold that a crop or a herd is exempt from taxation merely because it is, by its owner, intended for exportation. If such were the rule, in many states there would be nothing but lands and real estate to bear the taxes. Some of the western states produce very little, except wheat and corn, most of which is intended for export; and so of cotton in the southern states. Certainly, as long as these products are on the lands which produce them, they are part of the general property of the state. And so we think that they continue to be until they have entered upon their final journey for leaving the state and going into another state. It is true, it was said in the case of The Daniel Ball, 10 Wall. 565 (77 U. S. bk. 19, L. Ed. 1002): 'Whenever a commodity has begun to move as an article of trade from one state to another, commerce in that commodity between the states has commenced.'

But this movement does not begin until the articles have been shipped or started for transportation from the one state to the other. The carrying of them in carts or other vehicles or even floating them to the depot where the journey is to commence is no part of that journey. That is all preliminary work, performed for the purpose of putting the property in a state of preparation and readiness for transportation. Until actually launched on its way to another state, or committed to a common carrier for transportation to such state, its destination is not fixed and certain. It may be sold or otherwise disposed of within the

state, and never put in course of transportation out of the state. Carrying it from the farm or the forest to the depot is only an interior movement of the property, entirely within the state, for the purpose, it is true, but only for the purpose of putting it into a course of exportation; it is no part of the exportation itself. Until shipped or started on its final journey out of the state its exportation is a matter altogether in fieri, and not at all a fixed and certain thing."

In *American Manufacturing Co. v City of St. Louis*, 250 U. S. 459, 63 L. Ed. 1084, it was held that a municipal license tax upon the conduct of a manufacturing business in the city is not an unconstitutional regulation of interstate commerce merely because the amount of the tax is measured by the amount of sales of goods manufactured in the local factory, whether sold within or without the State either in domestic or interstate commerce.

In the case of *Crescent Cotton Oil Co. vs. Mississippi*, 257 U. S. 129, 66 L. Ed. 166, it was held that the fact that a non-resident corporation operating a cotton seed oil mill in its home state and cotton gins in Mississippi ships out of the latter state for use in its oil mill all of the cotton seed which may be purchased in connection with its ginning operations does not make such operations an instrumentality of interstate commerce.

In *Diamond Match Co. vs. Village of Ontonagon*, 188 U. S. 81, 47 L. Ed. 394, the Supreme Court held that forest products in transit to a point outside the state may be given by the legislature a situs, for the purpose of taxation, at

the place nearest to the last boom or sorting gap of the stream in or bordering on the state in which such products naturally will be last floated during such transit.

In *Carson Petroleum Co. vs. Vial*, 279 U. S. 94, 73 L. Ed. 626, text 629, the Supreme Court held as follows:

> "In *Hughes Bros. Timber Co. vs. Minnesota*, 272 U. S. 469, 71 L. Ed. 359, 47 Sup. Ct. Rep. 170, pursuant to a contract of sale, logs cut were gathered on the Swamp river in Minnesota by the vendors and were floated by river to Lake Superior, there loaded onto the vendee's vessels and transported to their destination in Michigan. This Court said:
>
> > " 'The conclusion in cases like this must be determined from the various circumstances. Mere intention by the owner ultimately to send the logs out of the state does not put them in interstate commerce, nor does preparatory gathering, for that purpose, at a depot. It must appear that the movement for another state has actually begun and is going on. Solution is easy when the shipment has been delivered to a carrier for a destination in another state.' "

The beginning of the transit which conducts interstate commerce is the point of time that an article is committed to the carrier for transportation to the state of its destination or started on its ultimate passage.

McCluskey vs. Marysville, 61 L. Ed. 578;
General Oil Co. vs. Crane, 52 L. Ed. 754.

In the case of *Atlantic Coast L. R. Co. vs. Standard Oil Co.*, 72 L. Ed. 270 the Court held:

"The important controlling fact in the present controversy, and what characterizes the nature of the commerce involved, is that the plaintiff's whole plan is to arrange deliveries of all of its oil purchased on the seaboard of Florida so that they may all be there stored for convenient distribution in the state to the 123 bulk stations and to fuel oil plants in varying quantities according to the demand of the plaintiff's customers, and thence be distributed to subordinate centers and delivery stations, and this plan is being carried out daily. There is neither necessity nor purpose to send the oil through these seaboard storage stations to interior points by immediate continuity of transportation. The seaboard storage stations are the natural places for a change from interstate and foreign transportation to that which is intrastate and there is nothing in the history of the whole transaction which makes them otherwise, either in intent or in fact. There is nothing to indicate that the destination of the oil is arranged for or fixed in the minds of the sellers beyond the primary seaboard storages of the plaintiff company at Tampa, Port Tampa, Jacksonville, or the St. Johns river terminal. Everything that is done after the oil is deposited in the storage tanks at the Tampa destinations, or at the Jacksonville destinations is done in the distribution of the oil to serve the purposes of the plaintiff company that imported it. Neither the sellers who deliver the oil nor the railroad company that aids the delivery of the oil to the storage tanks and tank cars at the seaboard has anything to do with determining what the ultimate destination of the oil is, or has any interest in it, or any duty to discharge in respect to it, except that the rail-

road company, after the storage in Florida has been established for the purposes of the plaintiff company accepts the duty of transporting it in Florida to the places designated by the plaintiff company." * * * * * * * * * * *

"We have no hesitation in saying that the nature of the commerce in controversy in this case was intrastate.

"The case is like that of *General Oil Co. vs. Grain*, 209 U. S. 211, 52 L. Ed. 754, 28 Sup. Ct. Rep. 475, in which the General Oil Company sought an injunction against the collection of a tax for the inspection of certain of its oils in Tennessee, which it had brought into Tennessee and stored in tanks, and marked in storage tanks as oil already sold in Arkansas, Louisiana and Mississippi, and which remained in Tennessee only long enough to be properly distributed according to the orders therefor, and other oil in other tanks marked to be sold in those states but for which no orders at the time of shipment from the manufacturing plants had been received. The court held that the Tennessee tax was not a burden on interstate commerce as applied to oil coming from certain states though ultimately intended for sale and distribution in states other than Tennessee; that the oil was subject to a tax while it was being stored in Tennessee for convenience of distribution and for reshipping in tank cars and barrels; that this was business done in Tennessee, where the oil was brought to rest, and was for a purpose outside its mere transportation." * * * * * * *

"The argument is made that these are continuous streams of oil from Baton Rouge or Tampico into bulk stations in the interior of Florida

where it is sold to the customers of the plaintiff, and that its interstate character continues through that entire passage. It may be, as suggested in the argument, that oil is being discharged into plaintiff's receptacles for its storage at the same time that it is being discharged from the storage tanks into storage tank cars for its distribution, but that it is not at all inconsistent with its being a closing of an interstate or foreign transportation and a beginning of intrastate distribution for the purpose and business of the plaintiff."

In *Merchants Exchange vs. Missouri*, 248 U. S. 365, the Supreme Court held that the statute of Missouri providing that in cities having more than 75,000 inhabitants, buildings used for the storage of grain shall be deemed public warehouses, and prohibiting the issuance of weight certificates by other than authorized bonded state weighers, did not violate the Federal Constitution.

In *Hope Natural Gas Company vs. Hall*, 274 U. S. 284, the statute of West Virginia levied an occupation tax on persons engaged in producing for sale natural gas. The Hope Natural Gas Company was principally engaged in producing natural gas in West Virginia, and was transporting it directly from the well to another state and selling it. The Supreme Court held that the West Virginia statute did not violate the Federal Constitution.

In *Oliver Iron Mining Co. vs. Lord*, 262 U. S. 172, the statute of Minnesota levied a tax upon each person "engaged in the business of mining or producing iron ore or other ores." Plaintiff was engaged in mining the ore and

loading it immediately on cars and shipping it in interstate commerce. Plaintiff was engaged in interstate commerce, but the Court held that the tax was not unconstitutional because it did not apply until the coal was actually loaded on the cars.

It seems that these cases are based on the principle that the State may tax the commodity until such commodity is actually in interstate commerce. This is true even though plaintiff's business is an interstate commerce business.

In the Natural Gas Company and Oliver Iron Mining Company cases, supra, it appears that the plaintiffs bought the gas and coal before it was produced, and that they bought it for the purpose of selling it in interstate commerce, and did so sell it. However, the Court holds squarely that the mining of the coal and the production of the gas was not interstate commerce, and an occupation tax on the Gas Company and the Coal Company was legal.

The state of Pennsylvania enacted a staute levying a tax on the gross income of a railroad corporation engaged in interstate business. The tax applied to income received in interstate business, as well as to income derived from intrastate business. In the case of *Philadelphia and Reading Railroad Company vs. Commonwealth of Pennsylvania*, 82 U. S. 164, text 167, the Court held as follows:

> "No doubt every tax upon personal property or upon occupations, business or franchises, affects more or less the subjects and the operations of commerce. Yet it is not everything that af-

fects commerce that amounts to a regulation of it, within the meaning of the Constitution."

* * * * * * * * * * *

"Is, then, the tax imposed by the Act of February 23, 1866, a tax upon freight transported into or out of the State, or upon the owner of freight, for the right of this transporting it? Certainly it is not directly. Very manifestly it is a tax upon the Railroad Company, measured in amount by the extent of its business, or the degree to which its franchise is exercised. That its ultimate effect may be to increase the cost of transportation must be admitted. So it must be admitted that a tax upon any article of personal property, that may become a subject of commerce, or upon any instrument of commerce, affects commerce itself. If the tax be upon the instrument, such as a stage-coach, a railroad car, or a canal, or steamboat, its tendency is to increase the cost of transportation. Still it is not a tax upon transportation, or upon commerce, and it has never been seriously doubted that such a tax may be laid. A tax upon landlords as such affects rents, and generally increases them, but it would be a misnomer to call it a tax upon tenants. A tax upon the occupation of a physician or an attorney, measured by the income of his profession, or upon a banker, graduated according to the amount of his discounts or deposits, will hardly be claimed to be a tax on his patients, clients or customers, though the burden ultimately falls upon them. It is not their money which is taken by the government. The law exacts nothing from them. But when, as in the other case between these parties, a company is made an instrument by the laws to collect the tax from transporters, when the statute plainly contemplates

that the contribution is to come from them, it may properly be said they are the persons charged. Such is not the case. The tax is laid upon the gross receipts of the Company; laid upon a fund which has become the property of the company, mingled with its other property, and possibly expended in improvements or put out at interest. The statute does not look beyond the corporation to those who may have contributed to its treasury."

The State of Illinois enacted a statute regulating the storage of grain in warehouses. The warehouses contended that the statute was unconstitutional for the reason that Congress had enacted certain statutes to regulate warehouses.

In the case of *Munn vs. People of Illinois*, 94 U. S. 77, text 87, the Court held as follows:

"It was very properly said in the case of the State Tax on R. Gross Receipts, 15 Wall. 293 (82 U. S. XXI, 167), that 'It is not everything that affects commerce that amounts to a regulation of it, within the meaning of the Constitution.' The warehouses of these plaintiffs in error are situated and their business carried on exclusively within the limits of the State of Illinois. They are used as instruments by those engaged in State as well as those engaged in interstate commerce, but they are no more necessarily a part of commerce itself than the dray or the cart by which, but for them, grain would be transferred from one railroad station to another. Incidentally they may become connected with interstate commerce, but not necessarily so. Their regulation is a thing of domestic concern and, certainly until Congress acts in ref-

erence to their interstate relations, the State may exercise all the powers of government over them, even though in so doing it may indirectly operate upon commerce outside its immediate jurisdiction. We do not say that a case may not arise in which it will be found that a State, under the form of regulating its own affairs, has encroached upon the exclusive domain of Congress in respect to interstate commerce, but we do say that, upon the facts as they are represented to us in this record, that has not been done."

In the case of *Lemke vs. Farmers' Grain Company*, 258 U. S. 50, a statute of North Dakota had eleven different provisions in reference to grains purchased in that state. The provisions were as follows:

"Authority is given to a state inspector appointed by the governor,—

(a) To appoint a chief deputy inspector of grades, weights and measures; a chief elevator accountant; deputy inspector of grades, weights and measures; state deputy inspector of grades, weights and measures, and warehouse inspectors;

(b) To issue license to warehouses, buyers and solicitors of grain and other agricultural products;

(c) To establish uniform grades for grain, etc., for the state of North Dakota; to alter and modify such grades;

(d) To establish uniform grade certificates used in marketing the grain, etc.;

(e) To hear and determine appeals from state deputy inspectors and from deputy inspectors of grades, weights, and measures;

(f) To conduct investigations in regard to marketing, grading, and weighing of grain, etc.;

(i) To establish a reasonable margin to be paid producers of grain by warehouses, elevators and mills;

(j) To fix and determine all charges for grading, inspecting and weighing grain, etc.;

(k) To make rules, etc., to carry out the provisions of this act."

The facts in this case are very similar to the facts in the case at bar, except grain was handled in the former and cotton in the latter. The Supreme Court held that the North Dakota law was unconstitutional on the sole and only ground that it undertook to tax the selling price of grain purchased in North Dakota, even though such grain was sold in another state and in interstate commerce. Paragraph (i) of said act authorized the inspector "to establish a reasonable margin to be paid producers of grain by warehouse elevators and mills." The court in effect held that all of the other provisions of said statute were constitutional. The statute is copied in full in said opinion.

The court further held that it could not eliminate the unconstitutional provision of said statute and hold the balance of said act valid, and, therefore, held the whole act was unconstitutional. The court expressly held as follows, after stating its finding in this case:

"Nor is this conclusion opposed by cases decided in this court and relied upon by appellants, in which we have had occasion to define the line

between state and Federal authority under the facts presented, which required a definition of interstate commerce where the right of state taxation was involved, or manufacture or commerce of an intrastate character was the subject of consideration."

In the case at bar it appears from the allegations in the original bill that the producers of the cotton shipped or hauled said cotton to Clarksdale for at least four specific purposes: First, for the purpose of storing it until it could be sold; second, for the purpose of getting it to a market; third, for the purpose of getting warehouse receipts in order that they might be bought and sold without the necessity of the actual delivery of the cotton; fourth, in order that it might be compressed in further preparation for marketing it. If the movement of the cotton had been stopped merely for the purpose of a change in the method of transportation, then the cotton may have been in interstate commerce. However, as held in cases herein cited, when a commodity is stopped for other purposes, then it is not in interstate commerce until it starts on its final journey.

So long as the cotton remained in the compress, it was under the direction and control of its owner and could be diverted from or started on its way in interstate commerce.

I think it clear that under the facts stated in the original bill, the cotton was not in interstate commerce until actually loaded on the cars out of the compress for shipment to its final destination, and that inasmuch as they applied prior to such time, the tax was legal and valid.

I, therefore, most respectfully submit that the decree of the lower court should be reversed and the perpetual injunction granted by said court should be dissolved.

Respectfully submitted,

GEO. T, MITCHELL,
Attorney General,

J. A. LAUDERDALE,
Assistant Atty. General,

Attorney For Appellants.

APPENDIX A—CHAPTER 88 LAWS 1930

SECTION 1. Be it enacted by the Legislature of the State of Mississippi, That this Act may be cited as the "Privilege Tax Law of 1930."

Definitions:

The term "person" and/or "company" herein used, interchangeably, when used in this chapter, shall be taken to include any individual, firm, partnership, joint adventure, association, corporation estate trust or any other group or combination acting as a unit and includes the plural as well as the singular number, unless the intention to give a more limited meaning is disclosed by the context.

The term "population" when used in this chapter means the population as shown by the latest published census made by the United States; provided, that when any municipality makes and certifies an enumeration, as provided by law, it shall mean the population shown by such enumeration; except, that prior to the publication of the Fifteenth census of the United States, it shall mean the population generally reported and accepted as correct, and which may be verified by competent evidence.

The terms "year" and "annually" shall mean either the calendar year or a period of twelve calendar months.

The term "capacity" when used in this act with reference to manufacturing establishments shall mean and shall

be determined from the rated capacity of the machinery installed were the same operated on a ten hour schedule daily for the period mentioned.

The term "business" when used in this act shall include all activities or acts personal, professional, or corporate, engaged in or caused to be engaged in with the object of gain, profit, benefit, or advantage, either direct or indirect, or following and/or engaging in any trade, calling or profession, and all things which occupy the time, attention and labor of men for the purpose of a livelihood or profit.

The term "place of business" when used in this act means a store, shop, counting room, office, factory, or other location or locations, whether in a building, enclosed space, or in any undefined place or places where any business as herein defined is done, conducted or carried on.

The term "state license" when used in this act means a privilege license issued by the officer whose duty it is to collect the tax, usable, good and valid in the county named in the license, and it shall be the authority of the licensee to engage in the business designated therein, for the period of time and under the conditions and at the place stated.

The term "state-wide license" when used in this act means a license issued by the State Tax Commission, Commissioner of Insurance, or other officer required to collect the tax, usable, good and valid in each and every county in the state, and shall be the authority of the licensee to engage in the business designated for the period of time, un-

der the conditions specified therein, throughout the entire state.

The term "officer" and/or "collector," when used in this act with reference to officers whose duty it is to collect privilege taxes, means and shall include every officer of the State of Mississippi whose duty it is to collect privilege taxes as by law provided.

The word "taxpayer" when used in this act means any person liable for any tax hereunder, in addition to the usual meaning of such word.

All such licenses, whether state licenses or state-wide licenses, shall be good, usable and valid for one year from the date thereof, unless a more limited period is shown, but no license shall be issued for a longer period than one year.

SEC. 56. COTTON BUYERS—Every person engaged in the business of buying and selling cotton for himself shall pay a privilege tax of one hundred ($100.00) dollars; but, where a cotton buyer only buys cotton from one gin in only one county or buys from the producers in only one municipality, said privilege tax is twenty-five ($25) dollars; the license must be issued in his name, and may be paid on or before the first day of September for a full year; only the municipality of his residence can collect a municipal privilege tax of him. Every individual, firm, partnership or corporation engaged in the business of buying or selling cotton shall take out in his or their name a state privilege tax of twenty-five ($25.00) dollars for every employee engaged in their business as buyer or seller, on or before

the first day of September; such privilege tax shall authorize the buying or selling cotton by its bearer; and it shall be unlawful for any employee to buy or sell cotton without a privilege tax in his possession, issued in the name of his employer. Such license cannot be issued for less than a year.

If the individual, firm, partnership, or corporation take out a municipal privilege in his or their name for the municipality of the residence of their employee and take out also, the state privilege tax imposed on them above, such employee shall have the authority to buy or sell cotton in any other municipality of the state, without paying any further state or municipal privilege tax.

But the above privilege taxes shall not be required of any landlord or other person who receives cotton in payment of accounts due him, nor of any merchant who pays a privilege tax on a store and who purchases only from the producer at the place of business of such merchant, nor to cotton mills domiciled in Mississippi where the cotton is purchased for manufacturing purposes.

IF Part of Act Invalid, Not to Affect Entire Act.

SEC. 244. That if for any reason any section, paragraph, provision, clause, or part of this chapter shall be held unconstitutional or invalid, that fact shall not affect or destroy any other section, paragraph, provision, clause, or part of this chapter not in and of itself invalid, but the remaining portion hereof shall be in force without regard to that so invalidated.

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CHARLES ELMORE CROP
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1931.

NO. 84

W. L. MATTHEWS, et al, Appellants,
Vs.
J. F. RODGERS, et al, Appellees.

REPLY BRIEF FOR APPELLANTS.

GEO. T. MITCHELL, Attorney General,
J. A. LAUDERDALE, Asst. Atty. Gen.
Attorneys for Appellants.

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In The Supreme Court of The United States

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NO. 84

W. L. MATTHEWS, et al, Appellants,
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REPLY BRIEF FOR APPELLANTS.

Counsel for appellants desire to file a reply to that part of appellees' brief under the heading of "The Merits." Counsel for appellees cite, quote from and strongly rely upon the following two cases:

William Lemke vs. Farmers' Grain Co., 258 U. S. 50;
Shafer vs. Farmers' Grain Company, 268 U. S. 189.

The facts in said cases were practically the same and are practically the same as the facts in the case at bar. However, I will undertake to distinguish between the statutes construed in those cases and the statutes construed in the case at bar. Briefly stated, the facts were in said cases that certain persons were engaged in buying and shipping grain; that 90 percent or more of said grain was sold in interstate commerce, and 10 percent or less was sold in intra-

state commerce. In the case at bar appellees were engaged in the business of buying and selling cotton. 90 percent or more was sold in interstate commerce; 10 percent or less was sold in intrastate commerce.

In the two cases cited the Supreme Court was construing a statute of North Dakota. This statute attempted to fix the selling price or the margin of profit between the purchase and sales price of grain bought in North Dakota and sold. This statute applied and regulated the sales price of every bushel of grain bought in said state whether sold in interstate or intrastate commerce. There could be no interstate sale to which said statute would not apply. In the case at bar appellees were selling cotton both in interstate and intrastate commerce. Under the facts as shown in said record the appellees would have been liable for the privilege tax, even though they had not sold any cotton in interstate commerce. If they had not sold any cotton in intrastate commerce, there would have been no liability for the tax. It is shown by the pleading and by the agreed statement of fact that the law would not apply to persons engaged solely and exclusively in interstate commerce. At page 25 of the record in defendants' answer is the following statement:

> "Defendants admit the allegations in paragraph 1 of Section V but say that said section has no application to any person, firm, or corporation engaged solely and alone in interstate commerce, and that no officer of the State of Mississippi and none of the defendants named in said bill undertake, attempt, or threaten to enforce the provisions of said act when a person is engaged in interstate commerce alone. Defendants

admit, however, that when a person is engaged in both interstate and intrastate business that said defendants do attempt to enforce the provisions of said act."

At page 32 of the record it is shown that during one year the total business of appellee H. J. Murff and Company was $1,874,004.85; that $1,839,669.35 was interstate commerce and $34,335.50 was intrastate commerce. At page 36 of the record it is shown that the business of appellee B. F. Oliver and Company for three and one-half months was $114,626.49; that $102,952.87 was interstate commerce and $11,673.62 was intrastate commerce. This statement covers a period of only three and one-half months. These two businesses were taken as representative of the others, Murff and Company being one of the largest cotton buyers and Oliver and Company one of the smallest.

At page 9 of the record in the original bill of complaint it is alleged as follows:

> "The business of each individual plaintiff herein necessarily varies, but plaintiffs allege that the annual business of the plaintiffs herein range from 5,000 bales to 25,000 bales each, a reasonable profit for a cotton buyer in buying and reselling a bale of cotton upon said market in the manner aforesaid is not less than two and 50/100 dollars ($2.50) per bale."

In other words, the gross profit from said business ranges from $12,500.00 to $62,500.00 per annum.

The tax imposed on said cotton buyers as alleged in

said bill is $100.00 per year. This tax applies to all persons engaged exclusively in intrastate business and those who are engaged both in intrastate and interstate commerce because of the intrastate. It cannot be successfully contended that a person who is engaged alone or exclusively in intrastate commerce and who does a business of $34,000 upwards a year, or who does a business of $11,000 and upwards in three and one-half months would not be liable for this tax. In fixing the amount of this tax the legislature evidently had in mind that a large part of the cotton business in Mississippi was interstate, and, for this reason, fixed the tax at a very small amount. It is shown that the business of Murff and Company for one year was almost $2,000,000.00. The legislature certainly did not intend to tax all of this business when it fixed the tax at $100.00. Under the provisions of Section 189 of Chapter 88, Laws of 1930, a person engaged in buying and selling merchandise, or operating a store with a capital stock of more than $15,000.00 is required to pay a privilege tax of $100.00. In order for such person to do a volume as done by Murff and Company he would have to turn his entire stock 120 times each year.

Appellant cites and quotes at length from *Bowman vs. Continental Oil Company*, 256 U. S. 642. The facts in the Bowman case are analogous to the facts in this case. However, in said opinion the court holds as follows:

> "Upon the question of severability we are constrained to concur in the view adopted by the district court and this notwithstanding our hesitation in advance of a declaration of the court of last resort of the state to adopt a construction

bringing the law in conflict with the Federal Constitution."

This court has repeatedly held that the interpretation of a state statute in reference to its constitutionality by a state court of last resort is binding on this court.

It is true that the Supreme Court of Mississippi has never construed the statute imposing a privilege tax on cotton buyers. However, it will be noted with interest that Section 3339, Code of 1892 levies a privilege tax:

> "On each person engaged in buying or selling cotton for himself, or his agent, or employee of another and not a licensed merchant ..... $20.00."

That Section 3797, Code of 1906 levied a privilege tax:

> "On each person engaged in buying or selling cotton for himself, or his agent, or employee of another and not licensed as a merchant ..... $25.00."

That Section 67, Chapter 118, Laws of 1926, levied a privilege tax upon:

> "Every person engaged in the business of buying or selling cotton for himself shall pay a privilege tax of ..... $100.00"

This section contains also practically the same provision as Section 56, Chapter 88, Laws of 1930, the statute now in controversy.

I also call the court's attention to the fact that Section 3108, Code of 1930 provides as follows:

> "The following shall be exempt from taxa-

> tion * * * * * * (i) All farm products grown in this state for a period of two years after they are harvested when in the possession of or the title to is in the producer, except a tax of one-fifth of 1 percent per pound on lint cotton now levied by the board of commissioners of the Mississippi Levee District, and lint cotton for five years, regardless of ownership."

Section 3401, Code of 1892, Section 3894, Code of 1906, Section 221, Chapter 118, Laws of 1926 each provides that the privilege tax required by law in this state shall be paid and license obtained prior to the time the business is engaged in. In other words, the procurement of a license must be had before business is commenced, or the person engaging in such business will be subject to prosecution. In other words, the provisions of these sections are practically the same as Section 220, Chapter 88, Laws of 1930, except the person applying for license would not have to make written application therefor.

Chapter 90, Laws of 1930 levies a gross sales tax on certain businesses therein mentioned. Section 2 (c) of said chapter provides as follows:

> "Upon each person engaging or continuing within this state in the business of selling any tangible property whatsoever, real or personal, (not including, however, bonds or other evidences of indebtedness or stocks) there is hereby levied and shall be collected a tax equivalent to one-fourth of one per cent of the gross income of the business."

Section 4 of said chapter provides in part as follows:

"There are, however, exempted from the provisions of this article: * * * * * * * (c) Labor, agricultural and horticultural societies and organizations not operated for profit; and products of the farm including live stock, poultry, grove or garden when sold directly by the producer, or his authorized agent, and so long as said farm products are handled and/or sold by any one in their package and/or in the original state or condition of preparation of sale."

These statutes exempt the cotton buyer from the gross sales tax levied by said chapter.

I find, however, that our Supreme Court has construed statutes analogous to the one under consideration. In the case of *New Orleans M. & C. Railroad Company vs. State*, 110 Miss., 290, the court holds as follows:

"The state, through Ross A. Collins, Attorney General, and D. L. Thompson, Auditor of Public Accounts, brought this action of debt against appellant, a railroad company incorporated under the laws of Mississippi and operating a line of railroad from Mobile in the state of Alabama, through Mississippi, and to Middleton, Tennessee, to recover the privilege taxes for the year 1914, imposed by chapter 102, Laws of 1912, amending section 3856, ch. 114, of the Code of 1906. Chapter 102 of the Laws of 1912 is as follows:

'An act to increase the privilege taxes on railroads by amending section 3856 of chapter 114, of the Code of 1906. 'Amending Code as to Privilege Tax on Railroads.

'Section 1. Be it enacted by the legislature of

the state of Mississippi, that section 3856 of chapter 114, of the Code of 1906, levying privilege taxes on railroads be, and the same is hereby amended so that for the purpose of levying a privilege tax on railroads such railroads are divided into five classes, first, second, third, narrow gauge and levee district, and privilege taxes are levied on them as follows:

'On each railroad of the first class, per mile (mileage within the levee district or districts on which levee taxes are paid, excepted), forty-five dollars.

'On each railroad of the second class, per mile (mileage within the levee district or districts on which levee taxes are paid, excepted), Twenty-five dollars.

'On each railroad of the third class, per mile (mileage within the levee district or districts on which levee taxes are paid, excepted), ten dollars.

'On each narrow gauge railroad, per mile (mileage within the levee district or districts on which levee taxes are paid, excepted), two dollars and fifty cents.

'On that part of each levee district railroad of the first class, within the levee district or districts, on which levee taxes are paid, per mile, twenty dollars.

'On that part of each railroad of the second class, within the levee district or districts, on which levee taxes are paid, per mile, fifteen dollars.

'On that part of each railroad of the third class within the levee district or districts, on

which levee taxes are paid, per mile, seven dollars and fifty cents.

'On that part of each narrow gauge railroad within the levee district or districts, on which levee taxes are paid, per mile, two dollars and fifty cents.

'Sec. 2. The Railroad Commission shall, annually, on or before the first Monday in August, classify the several railroads according to their charter, and the gross earnings of each, and the privilege taxes thereon shall be paid on or before the first day of December, and the findings of the said Railroad Commission shall be certified to the auditor of public accounts and the chancery clerk of the county through which each road or roads run; and any person or persons, natural or artificial, who shall exercise any of the privileges taxed herein, without first paying the tax and procuring the tax or license, as required by law, shall be subjected to the pains and penalties imposed by section 3894 of the Code of 1906, and to such other pains and penalties as may be otherwise provided by law.

'Sec. 3. That this act take effect and be in force from and after its passage.

'Approved March 16, 1912.'

"Appellant was classified by the Railroad Commission as being in the third class and liable for the privilege tax of ten dollars per mile, and, declining to pay this tax, this suit was instituted in the circuit court of Forrest County for the recovery thereof. The declaration charges that appellant does a general intrastate business in the state of Mississippi, and operates a railroad in and through the counties of Green, Jasper, Jones,

Forrest, Perry, Newton, Neshoba, Winston, Choctaw, Webster, Chickasaw, Pontotoc, Union, and Tippah, and through various municipalities, which are detailed; that the Mississippi Railroad Commission had classified the railroads in the state in accordance with their charters and the gross earnings on intrastate business in the state, and that appellant had been classified as being a third class railroad within the meaning of said statute, and, by virtue of the act in question, was due to the state of Mississippi the sum of ten dollars per mile, or an aggregate sum of three thousand, five hundred and eighty-five dollars and fifty cents; that in addition, each of the municipalities mentioned in the declaration has a right under the laws of the state to levy a privilege tax not to exceed fifty per cent of the state tax, or five dollars per mile for the mileage within its corporate limits; that a statement of the municipalities and the amounts and their rates on the number of miles within the boundaries of each is attached to the declaration as Exhibit A, and made a part thereof, and that the defendant was due the several municipalities the amount shown in the exhibit; that the privilege tax in question is required to be paid to the auditor of public accounts on or before the first day in December of each year; that the tax is due and unpaid; that demand had been made, and the defendant refused to pay. Exhibit A tabulates the counties, and gives the mileage and total tax due on mileage in each county, and likewise shows a total amount claimed by municipalities of three hundred and one dollars and fifty cents, making a grand total of three thousand, nine hundred and eighty-nine dollars.

"A demurrer was interposed to the declara-

tion, attacking the constitutionality of the statute imposing this tax and submitting: First, that the act in question is void because in contravention of article 1, section 8, of the federal Constitution, in that it attempts to interpose a tax upon interstate commerce, and is an attempt to regulate the interstate commerce carried on by the defendant; second, that the act requires the Railroad Commission to classify railroads according to their gross earnings, and imposes a larger or smaller tax according to the amount of gross earnings as compared with the gross earnings of other carriers, and hence imposes a burden upon the interstate commerce of the defendant; third, that the statute contravenes the Fourteenth Amendment to the federal Constitution, in that it deprives the defendant of its property without due process of law and denies to it the equal protection of the law; and, fourth, that the act contravenes section 112 of the Constitution of the state of Mississippi, providing that taxation shall be uniform and equal throughout the state. The demurrer was overruled. The defendant declined to plead further, and judgment final was entered for the full demand sued for. From this judgment, appellant prosecutes an appeal, assigning as error the refusal of the court to sustain the demurrer and to hold the statute void and unconstitutional for the reasons submitted by the several grounds of the demurrer."

* * * * * * * * * *

"It is contended by appellant that the statute is obnoxious and contravenes the federal Constitution, in that it imposed a burden on the interstate commerce carried on by appellant as an interstate railroad; that the statute embraces all

railroads in Mississippi, both interstate and intrastate, without excepting from its operation the interstate business carried on by interstate railroads. It is further contended that the act imposes a burden on interstate commerce because of the provision directing the Railroad Commission to classify the several railroads according to the "gross earnings of each," without exempting or excepting the earnings derived from interstate commerce and business done for the United States government. It was the purpose of the statute in question to impose on railorads a privilege tax for doing business within the confines of our state —for doing a purely intrastate business. The whole act and the chapter in which it appears in our Code show a general scheme for imposing an excise or privilege tax on various occupations, businesses, and professions within the confines of our state, to raise revenues in support of our state government, and the act assumes, of course, that the occupation or business taxed is one to be done or carried on within the state. The right of the state to impose a privilege tax on railroads for doing a purely intrastate business is not controverted. Railroad companies by right of eminent domain appropriate and occupy hallowed and valuable territory, and otherwise enjoy special privileges and franchises. Individuals and corporations other than railroads are subjected to similar taxation. For the doing of an intrastate business, therefore, there can be and is no complaint by appellant. It is chartered under the laws of our state, and admittedly is doing both an intrastate and an interstate business. This statute, which has been on our books since 1892, in the first place levies a tax upon the privilege of doing a railroad business in Mississippi, and then for

the purpose of measuring that tax it prescribes and fixes a maximum and a minimum tax per mile on a standard gauge railroad, and, as a further means of distributing the burden in an equitable manner, empowers and directs the State Railroad Commission to classify standard gauge railroads into first, second, and third classes 'according to their charter and the gross earnings of each'."

* * * * * * * * * * *

"In attempting to square the act in question with the Constitution of the United States we must of course look to the act itself, the context or subject-matter dealt with, and the general purpose attempted to be accomplished. Taking the act by the four corners and keeping in view the object to be attained, we find this statute a part of the general scheme for levying privilege taxes on the several and various kinds of businesses, trades, and professions done, practiced and carried on in Mississippi. The state in its sovereign capacity is exacting from those who do business and practice and enjoy their several trades and professions a tax as a condition precedent to the right of exercising the privileges. The subject of the tax in each case is the party or corporation doing business, plying his trade, or practicing his profession in Mississippi, and not, of course, in a foreign state or country. The business sought to be taxed is, in each instance, the business done within the confines of our own state. In the case of appellant the tax sought to be imposed was certainly intended to be upon the business enjoyed by it in Mississippi and as a domestic corporation. Every intelligent man knows, and the legislature in enacting this law well knew, that a tax could not be imposed by our legislative de-

> partment on interstate commerce, and that no law could be passed burdening interstate commerce or seriously embarrassing railroads in doing such business, or in doing business for the United States government. It is therefore unreasonable to assume that the legislature had any intention of burdening or embarrassing interstate commerce."

It will be noted by the court that the language of the statute construed in said case is practically the same as the language of the statute in controversy in this case, that is, there is nothing in the language of either statute that would specifically limit its operations to intrastate commerce. It will be further noted that the court held that the railroad could not complain because it was taxed at the lowest rate. Appellees in the case at bar pay the same tax as the smallest cotton buyer engaged exclusively in intrastate commerce.

In the case of *J. E. Raley Brothers, et al vs. W. S. Richardson, et al*, 264 U. S. 157, this court held as follows:

> "Mr. Justice Sutherland delivered the opinion of the court:
>
> "A statute of Georgia (Acts 1921, p. 46, Par. 30) imposes a flat tax of $100.00 upon any broker or commission merchant buying or selling merchandise on commission for another, or engaged in the business of receiving or distributing articles of merchandise shipped to such broker or merchant for distribution on account of the shipper. The bill filed below sought to enjoin the collection of the tax on the ground that the statute violates the commerce clause of the Federal Con-

stitution, and also, contingently, upon the further ground that the statute is void under the equal protection clause of the 14th Amendment.

"The complainants were divided into two classes, A and B. The business of those in Class B was to solicit orders for goods from dealers in Georgia, which orders were sent to be filled, sometimes to nonresidents and sometimes to resident principals, the greater part of the business being with nonresident principals. The business of those in Class A was wholly confined to representation of nonresident principals. Upon acceptance of an order the goods are shipped by the principal to the purchaser, but remain the property of the former until the time of sale.

"The trial court sustained the tax as to Class B, and enjoined its collection as to Class A, and its judgment was affirmed by the supreme court. 154 Ga., 140, 113 S. E. 531. We are concerned here with the judgment only in so far as it affects Class B.

"The contention is that the tax is laid expressly upon all brokers and commission merchants in the state, and upon the business done by them, whether interstate or intrastate, without separating one from the other. The state courts, by whose construction we are bound, held that the statute did not apply to interstate business; and we consider it as though it so provided in terms. It was held, however, that inasmuch as Class B complainants were engaged in intrastate business, they were subject to the tax, and none the less because they were also engaged in interstate business. With this conclusion we fully agree.

"The complainants were definitely engaged in the domestic business described in the statute, and were liable to the tax, irrespective of the extent of it, and whether they engaged in interstate business in addition or not. That the former was small in comparison with the latter makes no difference; nor does the fact that both were carried on at the same time and in the same establishment. If the two were not distinct, but the former a mere incident of the latter, the burden was upon complainants to furnish the proof; in which case a different question would arise. *Kehrer vs. Stewart*, 197 U. S. 60, 69, 49 L. ed. 663, 668, 25 Sup. Ct. Rep. 403. Certainly, one cannot avoid a tax upon a taxable business by also engaging in a nontaxable business.

"There is nothing in the contention that, because, under the construction placed upon the statute by the state courts, the tax falls upon those engaged in domestic business, and does not fall upon those engaged in interstate business, it is void for inequality. It would be a strange application of the equality provision of the 14th. Amendment to say that because a state is forbidden by paramount law to impose a tax upon some merchants, it is therefore powerless to impose it upon other merchants to whom the restriction does not apply. It is enough if the state observe the rule of equality among the persons subject to its taxing power.
Affirmed."

In the Bowman case, supra, this court states that it is deciding the question in advance of its determination by the Supreme Court of the State of New Mexico, while in the Raley case it followed a construction of the statute by the

Supreme Court of Georgia which is in direct conflict with the finding of the court in the Bowman case.

My contention is that the Supreme Court of this state has construed the state statute, and that this court is bound thereby. See also *Frank F. Kehrer vs. A. P. Stewart*, 197 U. S. 60, in which the court held as follows:

> "The only difficulty in this case arises from the fact that the tax is laid not in terms upon the domestic business, nor upon the gross receipts or profits which might be apportioned between interstate and domestic business, but is a gross sum imposed upon the managing agent of packing houses, regardless of the fact that the greater portion of the business may be interstate in its character. This contingency, however, is met by the case of *Osborne vs. Florida*, 164 U. S. 650, 41 L. Ed. 586, 7 Sup. Ct. Rep. 214, wherein a license tax imposed upon express companies doing business in Florida had been construed by the supreme court of that state as applying solely to business of the company done within the state, and not to its interstate business. Accepting this construction of the state statute as in reality part of the statute itself, we held that it did not in any way violate the Federal Constitution. The statute was sustained, notwithstanding the fact that 95 per cent of the business was interstate in its character, and only 5 per cent consisted of carrying goods and freight between points within the state of Florida."

Counsel also desires the following cases that should have been cited in the original brief:

Point I C—*Grambling v. Maxwell, Commissioner*, 52, Fed. 2nd. 256, Advance Sheets.

Point II A & B. *Eastern Air Transport, Inc. v. South Carolina Tax Commission*, 52 Fed. 2nd, 456, Advance Sheets.

I therefore, submit that inasmuch as appellees are engaged in intrastate business as well as in interstate business that the tax levied by said section 56, chapter 88, Laws of 1930 is not unconstitutional when assessed against plaintiff. I, therefore, most respectfully submit that the lower court erred in holding that section 56, chapter 88, Laws of 1930, was unconstitutional; that it erred in granting a perpetual injunction, and that its decree should be reversed by this court.

Respectfully submitted,

GEO. T. MITCHELL, Attorney General,

J. A. LAUDERDALE, Asst. Atty. Genl.
Attorneys for Appellants.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

NO. 84.

W. L. MATTHEWS, ET AL,

VS.

J. F. RODGERS, ET AL.

BRIEF FOR APPELLANTS ON RE-ARGUMENT

GEO. T. MITCHELL, Attorney General
Attorney General,

J. A. LAUDERDALE, Assistant
Attorney for Appellants.

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In The Supreme Court of The United States

OCTOBER TERM 1931

NO. 84.

W. L. MATTHEWS, ET AL,
VS.
J. F. RODGERS, ET AL.

BRIEF FOR APPELLANTS ON RE-ARGUMENT

PRELIMINARY STATEMENT

On the 2nd day of December, 1931, this case was argued and submitted to the Court. On December 14th, 1931, the Court made and entered an order restoring said cause to the docket for re-argument, limited to the questions of the jurisdiction of the District Court both with respect to the amount involved in the suit and the jurisdiction of the Court as a court of equity.

POINTS.

The argument for appellants will be presented under the following points, to wit:

I. There are no equitable grounds to sustain the jurisdiction of the Federal Court in equity, because

(a) Plaintiffs have a plain, adequate and complete remedy at law.

(b) The law of the State of Mississippi enlarging the right of injunction to restrain the enforcement and collection of an illegal tax cannot be enforced in the courts of the United States.

(c) The record affirmatively shows that plaintiffs would not suffer irreparable damages.

(d) The facts in the record are not sufficient to entitle plaintiffs to an injunction in order to prevent a multiplicity of suits.

II. The amount in controversy is less than $3,000.00 and, therefore, this Court is without jurisdiction.

BRIEF AND ARGUMENT.

I.

There Are No Equitable Grounds to Sustain the Jurisdiction of the Federal Court in Equity, because

(a)

Plaintiffs have a plain, adequate and complete remedy at law.

Section 267 Judicial Code (Section 384, Title 28, U. S. C. A.) provides as follows:

> "Suits in equity shall not be maintained in any court of the United States in any case where a plain, adequate and complete remedy may be had at law."

Under the law in the State of Mississippi, a person may pay a tax which he contends is illegal or unconstitutional or excessive to the tax collector, whose duty it is to collect same, under protest and notify such officer that his contentions

are that said tax is illegal, unconstitutional, or excessive and that it is his intention to sue said officer for said tax; then, the tax payer has a right of action against such officer for the tax so paid.

I respectfully call the court's attention to the case of *J. J. Coulson vs. T. D. Harris*, 43 Miss. 728. On the 12th day of April, 1867, Coulson filed his bill of complaint in the chancery court of Rankin County, Mississippi, and obtained an injunction to restrain T. D. Harris, as sheriff and tax collector of said county, from collecting the sum of $709.25 for state and county taxes alleged to be due for the fiscal year ending on the 1st day of May, 1867. The complainant alleged that all of said taxes was illegal and that the tax collector claimed the right to collect $9.25 more than the amount of taxes assessed.

One defense interposed by the tax collector was that complainant had a plain, adequate and complete remedy at law and that the chancery court did not have jurisdiction over said cause. On page 744 of the text, the court held in reference to the $9.25, claimed to be in excess of the amount due that "the tax collector has no right to collect more than the amount of taxes, but should he do so, the tax payer is not without remedy. He may recover it back in an action of *assumpsit* for money had and received to his use."

In reference to the tax claimed to be illegal or unconstitutional, the court held that this question had never been determined by the court of the State of Mississippi and very carefully considered the matter and cites a number of cases from various jurisdictions in support of the law as stated

by the court. In the course of its opinion, page 750, the court states as follows:

> "The trustees of the city of Louisville having, by their by-law, laid a tax of one hundred dollars on each billiard table in said city, Gwathmey & Gretsinger, who had a billiard table in said city, filed their bill in chancery for an injunction to restrain the trustees from the collection of the tax, on the ground that they had, in levying such tax, transcended their authority. To this bill, the trustees demurred, but their demurrer was overruled; and on a final hearing, the court decreed a perpetual injunction. From which decree the trustees carried the case to the court of appeals. And that court in delivering their opinion, say: 'There is obviously no ground for the interposition of a court of equity in this case. If the trustees had authority to levy the tax, they might, no doubt, rightfully collect it; and if they had no such authority, and should attempt to coerce the payment of the tax by distress, they would be guilty of a wrong, for which a court of law would afford an adequate remedy. It is true that a court of equity will sometimes interpose to prevent a wrong, but it is done in general only where the wrong is in its nature irreparable in the modes of redress afforded by courts of common law; and that cannot be said to be the case in relation to the supposed wrong which is apprehended by the complainants.' The trustees of *Louisville vs. Gwathmey & Gretsinger*, 1 A. K. Marshall, 412.
>
> "If the assessment of a tax be in violation of law, it is a void act; the collector, in enforcing its collection, is a trespasser, and the purchaser acquires no title at the sale, and in general, the tax payer has a plain, full, adequate and complete

remedy at law. In the case of *Marr vs. Enlow*, 1 Yerger, 452, an action of trover was brought against the tax collector for personal property, which he had seized for the purpose of enforcing the collection of a tax which had been illegally assessed. The supreme court of Tennessee held that the action would lie. And the same doctrine was maintained in the case of the county court of *Obion vs. Marr*, 8 Humphrey, 634; Blackwell on Tax Titles, 156."

Tuttle vs. Everett, 51 Miss. 27.

In this case, Everett, a tax payer, brought suit in the court of a justice of the peace against Tuttle, the Tax Collector of Carroll County, Mississippi, to recover $73.37, the amount of taxes by him illegally paid. The justice court gave judgment for the plaintiff and the same result was had in the circuit court and the cause appealed by Tuttle to the Supreme Court. The court holds as follows:

"It is insisted on the part of the plaintiff in error that the taxes were voluntarily paid, and for that reason cannot be recovered back from the tax collector. This would be a correct legal proposition, where the property is properly taxable, and there was a mere irregularity in the levy or collection of the tax. But where the assessment and levy of the tax is illegal and void, the tax paid to the collector may be recovered back by the tax payer from the tax collector, whilst the same remains in his hands. This is in accordance with reason, principle and authority. Blackwell in his valuable work on Tax Titles says: 'Where a county or other local corporation levy a tax which is illegal, and the citizens pays the tax to one who

has a formel authority to collect it, the payment is not voluntary but compulsive, and an action will lie against the collector to recover it back, unless he has paid it over to his superiors, in which event the action must be brought against the corporation.' Blackwell, 187, top page, 4th ed."

And cites *Coulson vs. Harris*, 43 Miss. 751, supra, with approval.

City of Vicksburg vs. Butler, 56 Miss. 72.

The tax collector for the City of Vicksburg demanded of Butler the payment of a *privilege tax* to carry on his business in the City of Vicksburg. Butler contended that the tax was illegal and objected to the payment. The questions considered by the court in the case were, first, whether or not the tax was paid under protest and, second, whether or not it could be recovered from the City of Vicksburg. The court held as follows:

"Butler, in his testimony, states that the collector pressed him for the money,—called several times. The firm objected to the tax as illegal, and paid because of a threat to shut up their shop.

"The tax payers brought to the notice of the collector that the tax was illegal, and the money was paid to avoid the extreme measures which might have been taken against them. We do not think this, within the just principle applicable, was a voluntary payment.

"Some of the cases refer to a notice to the collector that suit will be brought to recover the money back. That notice is necessary, if the payer intends to sue the collector. After its receipt, if

he pays it over to the proper treasury, he does so at his risk, and does not relieve himself from responsibility. If, however, he pays over the money without such notice, suit can only be brought against his principal,—in this case the City of Vicksburg."

The court also cites with approval the holding of the court in *Coulson vs. Harris*, and *Tuttle vs. Everett*, supra.

I call the court's especial attention to the fact that the tax paid by Butler in this case was a privilege tax and that the court held that if he had given the tax collector notice that he claimed the tax was illegal and that he would sue him for its recovery, that he would have had a right of action against the officer.

Richardson vs. Scott, 47 Miss. 236.

This was a proceeding in equity to enjoin the collection of a tax. The complainant alleged in his bill as follows:

"That the said Henry P. Scott has never given any bond for the collection of said tax, other than his official bond as tax collector of said county, and that said Scott owns no property in said county subject to execution except one horse and some small articles of personal property of no value to any one except himself, and that he is insolvent and cannot respond in damages to your complainants for the trespasses about to be committed by him in attempting to collect said tax, or for collecting the same unlawfully."

The court held as follows:

"In *Coulson vs. Harris*, 43 Miss., this doctrine

is stated: 'If there is anything special in the case, anything which renders the remedy at law impossible or incomplete, as for example, when the trespasser is insolvent, * * * in such case chancery will put forth its restraining hand, and compel the wrong-doer to desist.'

"We are of the opinion that the foregoing rule correctly sets forth one of the true grounds of equity jurisdiction, and that it is applicable to and shall govern the case at bar, as it is presented in the record. It should be added, that to the bill there was a demurrer, which was sustained, and the bill dismissed. From that decree the complainants appealed to this court. Upon the allegation of the insolvency of the tax collector and the want of any bond for the faithful collection and payment of the tax in question, his case is brought within the doctrine of *Coulson vs. Harris*, supra, as to equity jurisdiction. The chancellor ought, therefore, to have entertained the bill in this case, and disposed of the questions involved upon their merits."

This case does hold that a person may enjoin the collection of an illegal tax when the bill alleges special facts which render the remedy at law impossible or incomplete. However, there are no such allegations in the bill in the case at bar.

The case of *Coulson vs. Harris*, supra, was also cited with approval in the following cases:

Maury vs. Smith, 46 Miss. 81;

Drysdale vs. Pradet, 45 Miss. 445.

Section 420 of the Code of 1930 provides as follows:

> "The chancery court shall have jurisdiction of suits by one or more taxpayers in any county, city, town or village, to restrain the collection of any taxes levied or attempted to be collected without authority of law."

This statute first appeared as Section 1831, Code of 1880. In October, 1884, the Supreme Court of this state decided the case of *Anderson vs. Ingersoll*, 62 Miss. 73, wherein the court held as follows:

> "If the appellee was aggrieved by the action of the board of supervisors in increasing the assessment of his property, he should have appealed to the circuit court as he was permitted to do by Section 504 of the Code of 1880. The board had jurisdiction of the matter on which its action was taken and any error committed in its exercise was correctable by appellee. The appellee having failed to avail himself of the remedy provided by the statute, cannot invoke the aiding of the chancery court."

This case was cited with approval in the case of *Board of Supervisors vs. Ames*, 3 So. Reporter, 37 (this case is not reported in the official reports), wherein the court held as follows:

> "As the improvements were put on the lot after the first of February, the increase of value therefrom was not taxable for the year 1886, but the plain, adequate and inexpensive remedy of appellee was to apply to the board of supervisors to reduce his assessment and if it refused his request, to appeal to the circuit court; and he had

no right to resort to chancery in the absence of special circumstances making such resort proper."

Under the holding of the court in these decisions, it is apparent that even in the state courts of the State of Mississippi the provisions of Section 420, Code of 1930, do not apply where the aggrieved taxpayer has an adequate remedy at law.

From the opinions of the Supreme Court of the State of Mississippi hereinbefore quoted and Section 420, Code of 1930, it affirmatively and conclusively appears that under the laws in the State of Mississippi, a taxpayer may contest the validity of the collection of a privilege tax in one of two ways: First, he may pay the alleged illegal or invalid tax under protest giving the tax collector notice at the time of the payment that he intends to sue him for its recovery and then bring his action at law against such officer for the amount of tax paid; second, if he have no adequate remedy at law, he may apply to a court of equity for injunctive relief without paying the alleged illegal or invalid tax in advance.

There are no allegations in the bill of complaint or in the record which show that plaintiffs could not have paid the tax of $100.00 levied by this statute in question and recovered it from the officer making the collection, provided, of course, the law in reference to protest, notice, etc. was followed:

Henrietta Mills vs. Rutherford County, 281 U. S. 121.

In this case, Henrietta Mills, a corporation, brought suit in the district court of the United States to enjoin Ruth-

erford County, in the State of North Carolina, from collecting a tax upon its property.

The law of the State of North Carolina, as quoted on page 125 of the opinion, and the decisions of the court as quoted on pages 126 of the opinion, show that the law of the State of North Carolina is practically the same as the law of the State of Mississippi. The court held in this case that under the laws of the State of North Carolina, the tax payer had an adequate remedy at law and that a court of equity had no jurisdiction to enjoin the county from the collection of the tax.

Arkansas Building & Loan Association vs. Madden, Secretary of State, 175 U. S. 159.

It appears from the opinion in this csae that the Building & Loan Association, an Arkansas corporation, qualified to do business in the State of Texas; that at the time it so qualified the annual franchise or license tax was $10.00; subsequently, the law was amended and required the corporation to pay a franchise or license tax of $205.00 annually. The Building & Loan Association contended that the statute levying the franchise or license tax of $205.00 was unconstitutional and brought action in the Federal circuit court of Texas for an injunction against the collection of the franchise tax. The court held as follows:

> "The penalty denounced on failure to pay is the forfeiture of the right to do business in the state, and complainant averred that if that forfeiture were declared it would be subjected to irreparable injury and to a multiplicity of suits.

"It is on these grounds of equity interposition that the aid of the circuit court was sought to restrain the discharge by a state officer of duties imposed on him by the law of the state, and to adjudicate as to the validity of that law.

"But the bill of complaint did not set forth any facts tending to show that complainant could not escape the forfeiture by payment of the $205.00 under protest, and recover back money so paid if the law should be held void.

"We assume that the payment would, under the circumstances detailed, be compulsory and not voluntary, and no reason is perceived why the rule permitting recovery back would not apply.

"That rule as applicable here is that an action will lie for money paid, under compulsion, on an illegal demand, the person making it being notified that his right to do so is contested."

This case is on all fours with the case at bar for the reason that the taxing statute levied a franchise or license tax in the sum of $205.00 and the penalty for failure to pay same was a forfeiture of its right to do business in said state. The court holds that it could have paid the tax and then brought its action to recover same. In the case at bar, plaintiffs are required to pay a tax of $100.00. For its failure there is a penalty in the sum equal to the amount of tax and the tax payer may be prosecuted criminally. However, the penalty and the prosecution may be escaped by the prompt payment of the tax.

A. T. & S. Railway Company vs. O'Conner, 223, U. S. 280.

In this case an action was brought to recover taxes paid under duress and protest, the plaintiff contending that the law under which the tax was levied is unconstitutional. The court held as follows:

"It is reasonable that a man who denies the legality of a tax should have a clear and certain remedy. The rule being established that, apart from special circumstances, he cannot interfere by injunction with the state's collection of its revenues, and action at law to recover back what he has paid is the alternative left. Of course, we are speaking of those cases where the state is not put to an action if the citizens refuses to pay. In these latter he can interpose his objections by way of defense; but when, as is common, the state has a more summary remedy, such as distress, and the party indicates by protest that he is yielding to what he cannot prevent, courts sometimes, perhaps, have been a little too slow to recognize the implied duress under which payment is made. But even if the state is driven to an action, if, at the same time, the citizen is put at a serious disadvantage in the assertion of his legal, in this case of his constitutional, rights, by defense in the suit, justice may require that he should be at liberty to avoid those disadvantages by paying promptly and bringing suit on his side. He is entitled to assert his supposed right on reasonably equal terms.

* * * * * * * * * * *

"The other question is whether the defendant is liable to the suit. The defendant collected the money, and it is alleged that he still has it. He was notified when he received it that the plaintiff disputed his right. If he had no right, as he had, not to collect the money his do-

ing so in the name of the state cannot protect him. *Erskine v. Van Arsdale*, 15 Wall. 75, 21 L. Ed. 63,. See *Poindexter v. Greenhow*, 114 U. S. 270, 29 L. Ed. 185, 5 Sup. Ct. Rep. 903, 962. It is said that the money as soon as collected, belonged to the state. Very likely it would have but for the plaintiff's claim, assuming it to remain an identified trust fund; but the plaintiff's claim was paramount to that of the state, and even if the collector of the tax were authorized to appropriate the specific money and to make himself debtor for the amount, it would be inconceivable that the state should attempt to hold him after he had been required to repay the sum."

Allen, Comptroller of the State, v. Pullman Palace Car Company, 130 U. S. 658.

In this case bills were filed by the Pullman Palace Car Company to enjoin the Comptroller of the State of Tennessee from the collection of certain privilege taxes or license fees. The court held as follows:

> "So far as appeared, complainant could avert all the consequences which it depreciated as likely to ensue if the state officers were not restrained by complying with the terms of that statute and availing itself by the remedies thereby afforded. *Pickard v. S. C. Company*, 117 U. S. 34."

A. Shelton, Sheriff, v. Platt, 139 U. S. 591.

In this suit, Platt brought suit in the Federal circuit court against the sheriff of Hamilton County, Tennessee and J. W. Allen, Comptroller of the State of Tennessee, to

enjoin the collection of a license tax on behalf of himself and his associates who were too numerous to be joined as parties, in which it was alleged that the tax was unconstitutional. The court held as follows:

> "The trespass involved in the levy of the distress warrants was not shown to be continuous, destructive, inflictive of injury, incapable of being measured in money or committed by irresponsible persons. So far as appeared, complete compensation for the resulting injury could have been had by recovery of damages in an action at law. There was no allegation of inability on the part of the express company to pay the amount of the taxes claimed, nor any averments showing that the seizure and sale of the particular property which might be levied on would subject it to loss, damage and inconvenience which would be in their nature irremediable. The bill showed the company to be doing a vast business, and it was an unreasonable inference that it must submit to the sale of its wagons and horses, or that such sale would work that kind of mischief which justifies the interference of equity in the application of a preventive remedy. Nor did the mere fact that its property might be used in the conduct of interstate commerce give jurisdiction. But in addition to all this, since 1873 there has been a statute in existence in Tennessee providing a remedy at law, which has been pronounced by this court simple and effective. *Tennessee v. Sneed*, 96 U. S. 69 (24:610)."

Singer Sewing Machine Company v. Benedict, Treasurer, 229 U. S. 481.

This was a suit by the Singer Sewing Machine Company to enjoin the collection of taxes. The court held as follows:

> "We refer to these cases, not as defining the jurisdiction in equity of the circuit court, for that they could not do (*Payne v. Hook*, 7 Wall. 425, 430, 19 L. Ed. 260, 261; *Whitehead v. Shattuck*, 138 U. S. 146, 34 L. Ed. 873, 11 Sup. Ct. Rep. 276; *Smyth v. Ames*, 169 U. S. 466, 516, 42 L. Ed. 819, 838, 18 Sup. Ct. Rep. 418, but as showing that the Colorado statute gave to one who should pay illegal taxes a right to recover back from the county the money so paid. This right was one which could be enforced by an action at law in the circuit court, no less than in the state courts, if the elements of Federal jurisdiction, such as diverse citizenship and the requisite amount in controversy, were present. *Ex parte McNeil*, 13 Wall. 236, 243, 20 L. Ed. 624, 626; *United States Min. Co. v. Lawson*, 67 C. C. A. 587, 134 Fed. 487, 769, 771. Thus it will be perceived that, if the taxes in question were illegal and void, as asserted, the company had a remedy at law. It could pay them, and, if the commissioners refused to refund, have its action against the county to recover back the money. Such a remedy, as this court often has held, is plain, adequate and complete in the sense of the guiding rule before named, unless there be special circumstances showing the contrary. *Dows v. Chicago*, 11 Wall. 108, 112, 20 L. Ed. 65, 67; *State Railroad Tax Cases*, 92 U. S. 575, 613, 614, 23 L. Ed. 669, 673, 674; *Shelton v. Platt*, 139 U. S. 591, 597, 35 L. Ed. 273, 276, 11 Sup. Ct. Rep. 646; *Allen v. Pullman Palace Car Co.* 139 U. S. 658, 661, 35 L. Ed. 303, 304, 11 Sup. Ct. Rep. 682; *Indiana Mfg.*

Co. v. Koehne, 188 U. S. 681, 686, 47 L. Ed. 651, 654, 23 Sup. Ct. Rep. 452."

Dalton Adding Machine Company v. State Corporation Commission, 236 U. S. 699.

This was an appeal from the Federal district court of Virginia to review a decree refusing to enjoin the threatened enforcement of a state statute requiring foreign corporations doing business in the state to obtain a license. The court held as follows:

> "The appellant contends that its business in Virginia is wholly interstate. A statute of Virginia requires foreign corporations doing business there to obtain a license from the state corporation commission, to pay a fee, etc., and it is alleged that the commission threatens to take proceedings to enforce the statute and the penalties provided for disobeying it against the appellant, contrary to Article 1, Section 8, of the Constitution. The appellant further alleges that it has reason to fear and fears a multiplicity of proceedings and the imposition of many fines, and that it will suffer irreparable loss from even a temporary interference with its affairs, through loss of sales and prestige, help to its competitors, and encouragement of similar proceedings in other states. 213 Fed. 889.
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> "We agree with the district court in its conclusion and in its grounds. Like it, we leave on one side the merits of the appellant's claim of immunity, and confine ourselves to deciding that no reason is shown for anticipating the ordinary course of the law. We also leave aside the question whether the action of the commission is or is

not the action of a court protected from interference on the part of the courts of the United States. Rev. Stat. Sec. 720. *Prentis v. Atlantic Coast Line Co.*, 211 U. S. 210, 226, 230, 53 L. Ed. 150, 158, 160, 29 Sup. Ct. Rep. 67. The general principle is that it is not for the courts to stop officers of this kind from performing their statutory duty for fear that they should perform it wrongly. *First Nat. Bank v. Albright*, 208 U. S. 548, 553, 52 L. Ed. 614, 616, 28 Sup. Ct. Rep. 349. Especially is this true in the matter of collecting taxes and license fees. *Boise Artesian Hot & Cold Water Company v. Boise City*, 213 U. S. 276, 53 L. E. 796, 29 Sup. Ct. Rep. 426. The appellant has an adequate remedy at law in its right to raise the constitutional question if proceedings are taken against it, or, it seems, to recover the money if it pays under protest. No special circumstances are shown, that we can notice, to take this case out of the ordinary rule. *Indiana Mfg. Company v. Koehne*, 188 U. S. 681, 690, 47 L. Ed. 651, 656, 23 Sup. Ct. Rep. 452."

Ford Motor Company v. Chambers, Comptroller of California, 246 U. S. 647.

This was an appeal from the district court of the United States for the Northern District of California to review a decree dismissing a bill in the suit to enjoin the collection of a franchise tax, which judgment of the district court was affirmed with costs, upon authority of *Arkansas Building & Loan Association v. Madden*, 175 U. S. 269; *Boise Artesian Hot & Cold Water Company v. Boise City*, 213 U. S. 276; *Singer Sewing Machine Company v. Benedict*, 229 U. S. 481.

Gaar, Scott & Co. v. Shannon, 223 U. S. 468.

"Neither a statute imposing a tax, nor the execution thereunder, nor a mere demand for payment is treated as duress. It does not necessarily follow that there will be duress of goods. Or, if there is, the citizen to avoid the consequences of the duress, may pay the money, regain the use of this property, and maintain a suit for the recovery of what has been exacted from him. The legal remedy redresses the wrong. But he has the same right to sue if he pays under compulsion of a statute whose self-executing provisions amount to duress. An act which declares that where the franchise tax is not paid by a given date, a penalty of 25 per cent shall be incurred, the license of the company shall be cancelled, and the right to sue shall be lost, operates much more as duress than a levy on a limited amount of property. Payment to avoid such consequences is not voluntary but compulsory, and may be recovered back. *Swift & C. & B. Co. v. United States*, 111 U. S. 29, 28 L. Ed. 343, 4 Sup. Ct. Rep. 244; *Robertson v. Frank Bros. Co.*, 132 U. S. 23, 33 L. Ed. 238, 10 Sup. Ct. Rep. 5; *Oceanic Steam Nav. Co. v. Stranahan*, 214 U. S. 329, 53 L. Ed. 1018, 29 Sup. Ct. Rep. 671; *Atchison, T. & S. F. Co. v. O'Connor*, decided this day. (223 U. S. 280, ante, 436, 32 Sup. Ct. Rep. 216.)"

In the case at bar plaintiffs must pay the tax before the first day of September or they will be liable for penalties and criminal prosecution. This makes the statute a self-executing statute and if the taxes were paid in order to escape the penalties and criminal prosecution, then it would be paid under duress and could be recovered back.

Bailey v. George, 259 U. S. 15.

Plaintiff filed a bill for injunction seeking to restrain the collection of amounts assessed under the Child Labor Tax Law. The court held as follows:

> "An examination of the bill shows no other ground for equitable relief than as stated in the order. The bill does aver 'that these, your petitioners, have exhausted all legal remedies, and it is necessary for them to be given equitable relief in the premises;' but there are no specific facts set forth sustaining this mere legal conclusion. Section 3224, Rev. Stat. Comp. Stat. Section 5947, 3 Fed. Stat. Anno. 2d ed. p. 1032, provides that 'no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court'. The averment that a taxing statute is unconstitutional does not take this case out of the section. There must be some extraordinary and exceptional circumstances not here averred or shown to make the provisions of the section inapplicable. *Dodge v. Brady*, 240 U. S. 122, 126, 60 L. Ed. 560, 562, 36 Sup. Ct. Rep. 277. In spite of their averment, the complainants did not exhaust all their legal remedies. They might have paid the amount assessed under protest, then brought suit against the collector to recover the amount paid, with interest. No fact is alleged which would prevent them from availing themselves of this form of remedy."

Under the law of this state when taxes are paid under protest to a tax collector, who has notice that the taxpayer intends to sue to recover the tax, he is liable regardless of whether he has paid, or will thereafter pay the money into

the State Treasury. However, Section 3278, Code of 1930, provides that he may be repaid. See Appendix Page 54.

> The Supreme Court of the State of Mississippi has held that this statute was constitutional and moneys might be refunded to the tax collector without an appropriation by the Legislature. See *Taylor v. Guy*, 119 Miss. 357.

It, therefore, appears that in the event the tax collector is required to refund money collected in illegal taxes, he would not be the loser. The state would reimburse him for the amount so paid.

It therefore clearly appears that plaintiffs have a full, complete and adequate remedy at law and that an injunction will not lie to enjoin the collection of taxes in this case.

POINT I.

There Are No Equitable Grounds to Sustain the Jurisdiction of the Federal Court in Equity, because

(b)

The Law of the State of Mississippi Enlarging the Right of Injunction to Restrain the Enforcement and Collection of an Illegal Tax Cannot Be Enforced in The Court of the United States.

Section 1831, Code of 1880, now Section 420, Code of 1930, confers jurisdiction upon chancery courts to restrain the collection of any taxes levied, or attempted to be collected, without authority of law.

As hereinbefore shown, this right cannot be exercised even in the state court where the complainant has an adequate remedy at law. See the following cases:

Anderson v. Ingersoll, 62 Miss. 73;

Noxubee County v. Ames, 3 So. 37, supra.

Appellees contend that this equitable jurisdiction may be enforced in the Federal Courts.

Henrietta Mills v. Rutherford County, 281 U. S. 121.

This case was filed by the Henrietta Mills to enjoin the collection of a tax and contended that a state statute authorizing the issuance of an injunction by a state court could be exercised by the Federal court. The court held as follows:

> "The contention is that the state statute authorizing a proceeding in the state court for an injunction created an equitable right which should be enforced in the Federal court. It is true that where a state statute creates a new equitable right of a substantive character, which can be enforced by proceedings in conformity with the pleadings and practice appropriate to a court of equity, such enforcement may be had in a Federal court provided a ground exists for invoking the Federal jurisdiction. *Clark v. Smith*, 13 Pet. 195, 203, 10 L. Ed. 123, 127; *Broderick's Will (Kieley v. McGlynn)* 21 Wall. 503, 520, 22 L. Ed. 599, 605; *Holland v. Challen*, 110 U. S. 15, 24, 25, 28 L. Ed. 52, 55, 56, 3 Sup. Ct. Rep. 495; *Frost v. Spitley*, 121 U. S. 552, 557, 30 L. ed. 1010, 1012, 7 Sup. Ct.

Rep. 1129; *Gormley v. Clark*, 134 U. S. 338, 348, 33 L. Ed. 909, 913, 10 Sup. Ct. Rep. 554; *Lawson v. United States Min. Co.*, 207 U. S. 1, 9, 52 L. Ed. 65, 73, 28 Sup. Ct. Rep. 15; *Pusey & J. Co. v. Hanssen*, 261 U. S. 491, 498, 67 L. Ed. 763, 771, 43 Sup. Ct. Rep. 454. But the enforcement in the Federal Courts of new equitable rights created by states is subject to the qualification that such enforcement must not impair any right conferred, or conflict with any inhibition imposed, by the Constitution or laws of the United States. This court said in *Scott v. Neely*, 140 U. S. 106, 110, 35 L. Ed. 358, 360, 11 Sup. Ct. Rep. 712, that 'whenever, respecting any right violated, a court of law is competent to render a judgment affording a plain, adequate and complete remedy, the party aggrieved must seek his remedy in such court, not only because the defendant has a constitutional right to a trial by jury, but because of the prohibition of the act of Congress to pursue his remedy in such cases in a court of equity'. *Whitehead v. Shattuck*, 138 U. S. 146, 152, 34 L. ed. 873, 874, 11 Sup. Ct. Rep. 276; *Wehrman v. Conklin*, 155 U. S. 314, 323, 39 L. ed. 167, 172, 15 Sup. Ct. Rep. 129. Whatever uncertainity may have arisen because of expressions which did not fully accord with the rule as thus stated, the distinction, with respect to the effect of state legislation, has come to be clearly established between substantive and remedial rights. A state statute of a mere remedial character, such as that which the petitioner invokes, can not enlarge the right to proceed in a Federal court sitting in equity, and the Federal court may, therefore, be obliged to deny an equitable remedy which the plaintiff might have had in a state court. *Pusey & J. Co. v. Hanssen, supra.*".

I think this case is conclusive on this proposition.

POINT I.

There Are No Equitable Grounds to Sustain The Jurisdiction of the Federal Court in Equity, because

(c)

The Record Affirmatively Shows that Plaintiffs Would Not Suffer Irreparable Damages.

The argument made under Point I. A. is applicable to this point. If the appellees have an adequate remedy at law as argued in said point, then they could not suffer irreparable damages. The only damage that could possibly be suffered by them is the sum of $100.00 and this can be recovered in a suit at law.

Appellees cannot arbitrarily refuse to pay the license tax levied by the statute in controversy and incur penalties and crimnial liability and then claim that their damages are irreparable. It is the legal duty of the plaintiffs to pay the tax and sue for its recovery.

POINT I.

There Are No Equitable Grounds to Sustain The Jurisdiction of the Federal Court in Equity, because

(b)

The Court does not Have Equitable Jurisdiction on the Ground of Multiplicity of Suits.

This suit is brought by a number of plaintiffs seeking the same relief. However, when jurisdictional matters are

considered it must appear that each plaintiff has alleged facts so as to show the necessary jurisdictional facts, that is, each plaintiff must show jurisdiction.

There can be no multiplicity of suits in this case. Each plaintiff may follow his adequate remedy at law as shown hereinbefore in this brief, in which event he would pay a tax of $100.00 and bring his suit therefor.

However, if he fails or refuses to do this he would be liable to one civil suit for the tax and penalty, and to one criminal prosecution for failure to pay the tax.

Under the law of this State a person must make application for and pay his privilege license before he begins business. In the event he fails to do so and the license tax is later collected, it is dated as of the time he began business and is good for one year from said time. He is liable for only one tax and the penalty for one year.

In the event he fails to pay the tax when due, then he has violated the criminal law and may be prosecuted for his failure. However, he cannot be prosecuted but one time for failure to pay the tax. He could plead former conviction or acquittal in case he was prosecuted more than once for failure to pay the tax in any one year.

It is clear then that taking the case of each plaintiff that he could not be subjected to more than two suits—one civil suit for the tax and penalty, and one criminal suit for violating the law, and in the event he pays the tax, then only one suit is necessary to determine his liability.

In the original brief in this cause, counsel for appellees cite Pomeroy's Equitable Remedies, Volume 1, Section 272, page 658, and quotes therefrom as follows:

> "MULTIPLICITY OF SUITS.—This ground of jurisdiction has met with abundant recognition in cases of the 'Second Class', and of the 'Fourth Class'; but appears to have been rejected in one case of the 'Third Class', where the equity arises from the fact that the burden of an illegal tax falls on numerous inidividuals in the same way. This class is, at any rate, confined to cases where the tax as a whole is invalid, and in any event the jurisdiction is asserted to prevent a probable, not a possible, multiplicity of suits."

He also cites *Fairley v. Duluth*, 150 Minn. 374, 32 A. L. R. 1258, and quotes therefrom as follows: (Page 1267)

> "By the great weight of authority several taxpayers affected in a similar manner by an illegal tax or license fee may join in a proceeding in equity to restrain the enforcement of the tax and for such other relief as the nature of the case represented may require provided it is common to all of them," citing *King v. Wilson*, I Dill., 555, Fed. Cas. No. 7, 810; *Risley v. Utica*, 173 Fed. 502, appeal dismissed in 100 C. C. A. 688, 177 Fed. 1005."

It is clear that neither of these authorities sustain the contention of appellees herein.

The record in this case shows that there are several classes of cotton buyers—some who do an intrastate business, some who do both an intrastate and an interstate business, and perhaps some who do only an interstate business.

The statute in controversy is clearly not unconstitutional when applied to persons engaged in intrastate business. In the case at bar the Lower Court held that the statute was unconstitutional only when applied to interstate business. It appears, therefore, then that the statute is not illegal and the taxes levied thereby is not unconstitutional in all cases. In case cotton buyers pay the tax and sue for its recovery, or in case they fail to pay the tax and the State sues for the tax, the issue will be whether or not that particular cotton buyer is engaged in intrastate commerce or interstate commerce. If he is engaged in intrastate commerce the State will prevail, and if in interstate commerce the taxpayer will prevail.

The record shows that that was one of the difficulties encountered in the trial of this lawsuit. When it came to taking proof to sustain the allegations of the bill, it would have been necessary for each plaintiff to prove his "course of business" in order that the Court might determine whether that particular individual or firm was engaged in intrastate commerce or interstate commerce. The Court below specifically limited the injunction to the parties to this lawsuit. If indeed and in fact the statute had been unconstitutional and the tax illegal, then the Court would have enjoined the officers of the State from enforcing said statute against all persons engaged in buying and selling cotton in the State of Mississippi.

It further appears that a multiplicity of suits in a case of this character would be even more burdensome to the State and county officers than to the plaintiffs in this case. It would certainly not be to the best interest of the State for

a number of lawsuits to be filed and tried until the principles of law are established by the courts of higher jurisdiction. It might be conceded that under the facts in this case there is a possibility of a multiplicity of suits, yet there is little probability of a multiplicity of suits.

The case of *Boise Artesian Hot and Cold Water Co. v. Boise City*, 213 U. S. 276, was a suit to enjoin the collection of a privilege tax in the sum of $300.00 to be paid the first day of each and every month, and the bill also alleged that the municipal authorities were threatening to tear up or destroy the pipes of the company in the streets of the municipality. The Court held as follows:

> "The only suggestions of this kind which the bill presents are that the enforcement of the ordinance will lead to irreparable injury, to multiplicity of suits, and cast a cloud upon the company's title to its franchises.
>
> "But there is nothing in the bill which leads us to suppose that any of these results would be brought about by leaving the company to its defense at law. If the city had taken any steps indicating a purpose to remove the pipes and works of the company from the streets of the city, and to deny it the right to continue its business, there would be clear reason for the interposition of a court of equity, for if that were done illegally or unconstitutionally an injury would be inflicted for which the law could afford no adequate remedy. In such a case it would be the plain duty of a court of equity to arrest the destructive steps until their legality or constitutionality could be determined. Such a course would be for the best interests of both parties. * * * * *

"Nor do we think there is any danger of a multiplicity of suits in the sense that would authorize the issuance of an injunction. One suit only has been brought and that by direction of the city council. It remains pending, and when it reached judgment it will determine finally every question in dispute between the parties. There is no need of any other suit except to prevent the running of the statute of limitations, and nothing to indicate that any will be brought. Where the multiplicity of suits to be feared consists in repetitions of suits by the same person against the plaintiff for causes of action arising out of the same facts and legal principles, a court of equity ought not to interfere upon that ground unless it is clearly necessary to protect the plaintiff from continued and vexatious litigation. Something more is required than the beginning of a single action with an honest purpose to settle the rights of the parties. 1 Pom. Eq. Jur. 3d ed., Sec. 254."

In *Dalton Adding Machine Co. vs. State Corporation Commission*, 236 U. S. 698, the Court held as follows:

"We agree with the district court in its conclusion and in its grounds. Like it, we leave on one side the merits of the appellant's claim of immunity, and confine ourselves to deciding that no reason is shown for anticipating the ordinary course of the law. We also leave aside the question whether the action of the commission is or is not the action of a court protected from interference on the part of the courts of the United States. *Rev. Stat.*, Sec. 720. *Brentis vs. Atlantic Coast Line Co.*, 211 U. S. 210, 226, 230, 53 L. Ed. 150, 158, 160, 29 Sup. Ct. Rep. 67. The general prin-

ciple is that it is not for the courts to stop officers of this kind from performing their statutory duty for fear that they should perform it wrongly. *First Nat. Bank vs. Allbright*, 208 U. S. 548, 553, 52 L. Ed. 614, 616, 23 Sup. Ct. Rep. 349. Especially is this true in the matter of collecting taxes and license fees. *Boise Artesian Hot & Cold Water Co. vs. Boise City*, 213 U. S. 276, 53 L. Ed. 796, 29 Sup. Ct. Rep. 426. The appellant has an adequate remedy at law in its right to raise the constitutional question if proceedings are taken against it, or it seems, to recover the money if it pays under protest. No special circumstances are shown, that we can notice, to take this case out of the ordinary rule. *Indiana Mfg Y Co. vs. Koene*, 188 U. S. 681, 690, 47 L. Ed. 651, 656, 23 Sup. Ct. Rep. 452."

In the case of *Cave vs. Randolph*, 287 Fed. 989, the Federal Court held as follows:

> "Nor does the possibility of the multiplicity of arrests and trials in such cases pending a final decision of the question avail to bring the issue within the jurisdiction of equity."

In the case of *St. Louis I. M. & S. R. Co. vs. McKnight*, 244 U. S. 368, the Railroad Company sought to enjoin certain shippers and travelers from suing the railroad company on account of a controversy over the rates; that is, the railroad company had charged a rate in excess of that claimed to be due by the shippers and travelers. A great number of these claims were involved. The Court held as follows:

"The only common issue between the railway company and the several shippers and travelers (namely, whether the rates promulgated by the Railroad Commission were confiscatory) had been settled by the decision of this court. In no other respect have shippers and travelers a common interest. The claims of each present a seperate controversy unconnected with that of any of the others. This is obviously true as to all issues of fact which will arise in considering their several claims."

In the case of *Francis vs. Flinn*, 118 U. S. 389, the plaintiff sought the aid of a Court of equity to enjoin the officers and certain citizens of Louisiana from interfering with its piloting business. The Court held as follows:

"The whole gist of the complaint is that the defendants do not treat the plaintiff as having a right to use his vessel as a pilot boat, and have publicly so stated, and that some of the parties mentioned have been subjected to suits for their acts in piloting. But if this be so, the plaintiff has a full remedy for his alleged wrongs in the courts of law. They furnish no ground for the interposition of a court of equity. If the plaintiff has a right to pilot vessels with his boat through the pass and is wrongully interfered with by the defendants or others, he can prosecute them for this wrong. If his vessel is arrested in its passage, without lawful warrant, he can bring the defendants before the courts to answer for their conduct. If his pilots are duly licensed, and they are hindered or prevented from the exercise of their business, both he and they have the same means of redress which are afforded to every citizen whose rights are invaded and obstructed. If

the publications in the newspapers are false and injurious, he can prosecute the publishers for libel. If a court of equity could interfere and use its remedy of injunction in such cases, it would draw to itself the greater part of the litigation properly belonging to courts of law.

"We think the court below should have sustained the demurrer of the defendants for want of equity in the bill."

In *Dows vs. Chicago*, 78 U. S. 112, a bill for injunction was filed by Dows, the owner of stock in the Union National Bank, in which the validity of a tax on national bank stock was questioned. Of course, there were not only a number of stockholders in this particular bank interested, but also all stockholders in the national banks of the State of Illinois were interested in said suit. However, the Court held that the Federal Court did not have jurisdiction to restrain the collection of the tax in this case, the Court holding as follows:

"No court of equity will, therefore, allow its injunction to issue to restrain their action, except where it may be necessary to protect the rights of the citizen whose property is taxed, and he has no adequate remedy by the ordinary processes of the law. It must appear that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or where the property is real estate, throw a cloud upon the title of the complainant, before the aid of a court of equity can be invoked."

This is an old case and one of the leading cases on the subject, and has been followed and cited in almost every

case of importance involving the jurisdiction of a court of equity since said time.

The Federal courts have always refrained from taking jurisdiction in cases to enjoin the collection of state taxes, except when complainant makes the case free from doubt and under some well recognized rule of equity.

If this case can be sustained on the ground of multiplicity of suits, then there would be few, if any, cases in which the Court would not have jurisdiction to enjoin the collection of state taxes. There are very few statutes that would levy a tax on one or a few individuals. Most taxes would apply to a group or class or large number of individuals. The fact that a statute authorizes the collection of a tax from a number of individuals is not sufficient to give a court of equity jurisdiction. This is especially true in a case of this kind where the statute is admittedly constitutional, but the question involved is merely one of application.

THE STATUTE IN CONTROVERSY IS ADMITTEDLY VALID.

Plaintiffs contend that they are engaged solely in interstate commerce and when the statute is applied to persons engaged in such business, then it is unconstitutional and void. The Court below held that the statute was unconstitutional only when applied to persons engaged in interstate commerce.

Article XI of the Constitution of the United States is as follows:

> "The judicial power of the United States shall not be construed to extend to any suit in law, or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

An injunction to restrain a state officer from enforcing a valid state statute is a suit against the state and cannot be maintained.

Poindexter vs. Greenlaw, 114 U. S. 210;

Fitts vs. McGehee, 172 U. S. 516;

Arbuckle vs. Blackburn, 113 Fed. 616, 191 U. S. 405;
Francis vs. Flinn, 118 U. S. 385;

Dalton Adding Machine Co. vs. State Corporation Commission, 236 U. S. 698.

In the latter case the Supreme Court of the United States held as follows:

> "The appellant contends that its business in Virginia is wholly interstate. A statute of Virginia requires foreign corporations doing business there to obtain a license from the state corporation commission, to pay a fee, etc., and it is alleged that the commission threatens to take proceedings to enforce the statute and the penalties provided for disobeying it against the appellant, contrary to Article I, Paragraph 8, of the constitution. The appellant further alleges that it has reason to fear and fears a multiplicity of proceedings and the imposition of many fines, and that it will suffer ir-

reparable loss from even a temporary interference with its affairs, through loss of sales and prestige, help to its competitors, and encouragement of similar proceedings in other states.

"We agree with the district court in its conclusion and in its grounds. Like it, we leave on one side the merits of the appellant's claim of immunity, and confine ourselves to deciding that no reason is shown for anticipating the ordinary course of the law. We also leave aside the question whether the action of a court protected from interference on the part of the courts of the United States. *Rev. Stat.* Sec. 720. *Prentiss v. Atlantic Coast Line Co.*, 211 U. S. 210, 226, 230, 53 L. Ed. 150, 158, 160, 20 Sup. Ct. Rep. 67. The general principle is that it is not for the courts to stop officers of this kind from performnig their statutory duty for fear that they should perform it wrongly. *First Nat. Bank v. Albright*, 208 U. S. 548, 553, 52 L. Ed. 614, 616, 28 Sup. Ct. Rep. 349. Especially is this true in the matter of collecting taxes and license fees. *Boise Artesian Hot & Cold Water Co. v. Boise City*, 213 U. S. 276, 53 L. Ed. 796, 29 Sup. Ct. Rep 426. The appellant has an adequate remedy at law in its right to raise the constitutional question if proceedings are taken against it, or, it seems, to recover the money if it pays under protest. No special circumstances are shown, that we can notice, to take this case out of the ordinary rule. *Indiana Mfg. Co. v. Koehne*, 188 U. S. 681, 690, 47 L. Ed. 651, 656, 23 Sup. Ct. Rep. 452.

"The interpretation of valid criminal statutes of the state is a matter within the exclusive jurisdiction of the state courts, and the Federal courts

follow the interpretation of the state courts of last resort in such matters."

Central Consumers Co. v. Austin, 238 Fed. 616.

In *Hoffman Brewing Company v. M'Elligott*, 259 Fed. 525, it was held that a Federal District Attorney cannot be enjoined from instituting criminal proceedings, against concerns manufacturing and selling non-intoxicating beer on the ground that the attorney had transcended his authority by invoking the act against intoxicating liquors.

In *Harkrader v. Wadley*, 172 U. S. 148, the Supreme Court held as follows:

"No case can be found where an injunction against a state officer has been upheld where it was conceded that such officer was proceeding under a valid state statute. In the present case the commonwealth attorney, in the prosecution of an indictment found under a law admittedly valid, represented the state of Virginia, and the injunctions were therefore in substance injunctions against the state. In proceeding by indictment to enforce a criminal statute the state can only act by officers or attorneys, and to enjoin the latter is to enjoin the state. As was said in *Re Ayres*, 123 U. S. 443, 497, 931; 216, 227: 'How else can the state be forbidden by judicial process to bring actions in its name, except by constraining the conduct of its officers, its attorneys, and its agents? And if all such officers, attorneys, and agents are personally subjected to the process of the court, so as to forbid their acting in its behalf, how can it be said that the state itself is not subjected to the jurisdiction of the court as an actual and real defendant?"

I, therefore, most respectfully submit that this Court has no jurisdiction to restrain the enforcement of the statute levying the tax about which plaintiffs complain.

II.

THE AMOUNT IN CONTROVERSY IS LESS THAN $3,000.00 AND, THEREFORE, THIS COURT IS WITHOUT JURISDICTION.

The bill in this case seeks to enjoin the collection of a privilege or license tax in the sum of $100.00. The appellants here contend that the amount of such tax is the amount in controversy; that is, the only amount in controversy is the sum of $100.00.

Appellees concede that if the amount of the tax is the amount in controversy then the amount in controversy is less than $3,000.00, and this Court is without jurisdiction.

Appellees contend that the right of plaintiffs to do business is worth more than $3,000.00 and that the rights of plaintiffs to do business is the amount in controversy. Appellants concede that if the right of appellees to do business is the measure of the amount in controversy, then such amount is more than $3,000.00, and this Court has jurisdiction.

As shown in the argument under Point 1 (a) of this brief, the taxpayers in this case had the right and in fact it was their duty to pay the tax under protest and notify the officer of their intention to sue, and sue for the recovery of the tax so paid. This, then must be the amount in controversy. The taxpayers could escape all the penalties, lia-

bility to criminal prosecution and carry on their business in the usual and ordinary way in the event this tax was so paid.

In this case the value of plaintiff's rights to do business is fixed by law at $100.00 per annum. If this amount is paid then there can be no question but that plaintiffs would have the right to do business.

The law is well settled that when a suit is filed to enjoin the collection of an ad valorem tax, the amount of the tax is the amount in controversy. An ad valorem tax is really nothing more or less than a privilege tax for the privilege of using, enjoying and disposing of property. If a person fails to pay an ad valorem tax he loses possession of and title to his property.

If the ad valorem tax on real estate is less than $3,000.00 and such real estate is worth more than $3,000.00, the Court will not enjoin the collection of the tax because the tax is the amount in controversy and it is not $3,000.00, nevertheless, if the owner of the property refuses to pay the tax on the theory that it is illegal or unconstitutional, and the land is sold for its collection, and the Courts afterwards hold that the tax was valid and constitutional he loses the property. In other words, the loss on account of his failure to pay tax is more than the amount in controversy.

I am unable to see any distinction between that class of cases and the one at bar. The tax is, of course, the amount in controversy, for this is the amount that the plaintiffs may pay and secure all the rights for which they are contending.

Plaintiffs' prayer for an injunction (R. 16 is as follows: To restrain defendants, or either of them, "from collecting or seeking to collect from the plaintiffs the said privilege or occupation tax and/or said damages as provided by Chapter 88, Laws of State of Mississippi 1930."

The prayer further is that "it be adjudicated and determined that they have the right to engage in their said business free of the burdens placed thereon by said Chapter 88, Laws of 1930."

It is clear from this prayer that the only relief sought is the relief from the payment of the privilege tax thereby levied, and it is absolutely clear that if the collection of this tax is restrained, then none of the other things prayed for could happen. If the tax is paid, then plaintiffs are relieved of all further liability. The prayer of the bill shows clearly that the relief sought is nothing more nor less than to restrain the collection of the privilege tax levied by said section. If said officers could not collect the tax they certainly could not prosecute plaintiffs for failure to pay it, neither could they levy distress on property to pay it.

There appears to be a number of cases wherein this Court has decided what is and what is not the amount in controversy. A number of these cases are cases in which it was sought to enjoin the collection of taxes. In almost, if not all of these cases the Court holds that the amount of taxes is the amount in controversy. In other words, the decision of this Court seems to be uniform that where by the payment of a certain fixed sum the plaintiff to the suit

may relieve himself of all liability, penalties, etc., then the amount of such sum is the amount in controversy.

There is another line of cases which states the facts in each case and determines therefrom what the amount in controversy is. In most, if not in all of these cases, the plaintiff could not pay a certain fixed sum or perform a certain duty and obtain the relief asked for in such suits.

In *Fishback v. Western Union Telegraph Co.*, 161 U. S. 96, the telegraph company sought to enjoin the collection of certain taxes. It appears from the reported case that the taxes against the telegraph company were assessed in each county. The Court held that the telegraph company could not combine the taxes in the separate counties, and unless the tax in one county was more than the jurisdictional amount, then the suit must fail.

See also *Walter v. Northeastern R. R. Co.*, 147 U. S. 370.

In *Holt v. Indiana Manufacturing Co.*, 176 U. S. 68, it is held that a suit to restrain the collection of taxes not exceeding $2,000.00 in amount, though arising under the constitution or laws of the United States, is not within the jurisdiction of the Circuit Court of the United States.

This case further holds that future taxes which may be affected by the decision cannot be included in determining the value of the matter in dispute.

In *Citizens Bank of Louisiana vs. Cannon*, 164 U. S. 319, the Court held that in a suit by a bank to enjoin the

collection of taxes for certain years on property claimed to be exempt, the amount of the tax being insufficient to give jurisdiction, the fact that the value of the exemption during the continuance of the charter of the bank will exceed the jurisdictional amount, will not give jurisdiction.

In the case of *Cole vs. Norborne Land Drainage District*, 207 U. S. 45, the Supreme Court held that in a suit to enjoin the collection of a tax for drainage benefit on the ground of the unconstitutionality of the statute that the assessments against each of them was less than the jurisdictional amount and the suit could not be sustained.

The tax for the current year and not for future years controls in a case to enjoin the collection of a tax.

See *Citizens Bank v. Cannon*, 164 U. S. 319.

In *Turner v. Jackson Lumber Company*, 218 U. S. 685, the Supreme Court held that the amount in controversy was the amount of taxes in dispute, and that unless this was more than the jurisdictional amount, the Court would not have jurisdiction.

In *Lion Bonding Company v. Karatz*, 262 U. S. 77, the Supreme Court held that a plaintiff who sued on his own behalf and on behalf of other persons similarly situated, that the amount in controversy was the amount claimed by each plaintiff, and not the aggregate amount.

In *Scott v. Frazier*, 253 U. S. 243, the Supreme Court held:

"There is no allegation that the loss or injury to any complainant amounts to the sum of $3,000.00. It is well settled that in such cases as this the amount in controversy must equal the jurisdictional sum as to each complainant. *Wheless v. St. Louis*, 180 U. S. 379; *Rogers v. Hennepin Co.*, 239 U. S. 62.

"In cases where, although the entire matter in dispute in the suit exceeds in value the jurisdictional limit, nevertheless, if there are several and separate interests in that sum belonging to distinct parties and constituting distinct causes of action, although actually united in one suit and growing out of the same transaction, the jurisdiction of the court cannot be maintained where such separate interests are below the jurisdictional amount.

Ex Parte Baltimore, etc. R. Co., 106 U. S. 5;

Adams v. Crittenden, 106 U. S. 576;

Schewd v. Smith, 106 U. S. 188;

Elgin v. Marshall, 106 U. S. 578;

Ogden v. Armstrong, 168 U. S. 224;

Chamberlain v. Browning, 177 U. S. 605."

In *Packard vs. Banton*, 264 U. S. 140, a statute of the State of New York required persons operating motor vehicles to file a bond with personal or corporate sureties thereon. The bill alleged that it operated four motor vehicles and that the insurance companies required a premium of $960.00 for each motor vehicle. The bill further alleged that the income from each of said vehicles would be reduced $18.50 each per week. The Court held as follows:

"Appellees insist that the district court was without jurisdiction because the matter in controversy does not exceed the value of $3,000.00. Judicial Code, Section 24, Subd. 1. The bill discloses that the enforcement of the statute, sought to be enjoined, will have the effect of materially increasing appellant's expenditures, as well as causing injury to him in other respects. The allegations, in general terms, are that the sum or value in controversy exceeds $3,000.00, which the affidavits filed in the lower court tend to support; that appellant is the owner of four motor vehicles, the income from which would be reduced, if the law be enforced, to the extent of $18.50 each per week; and that his business would otherwise suffer. The object of the suit is to enjoin the enforcement of the statute, and it is the value of this object thus sought to be gained that determines the amount in dispute. *Mississippi & M. R. Co. v. Ward*, 2 Black, 485; 17 L. Ed. 311; *Texas & P. R. Co. v. Kuteman*, 4 C. C. A. 503, 13 U. S. App. 99, 54 Fed. 547, 552; *Nashville C. & St. L. R. Co. v. McConnell*, 82 Fed. 65, 73; *Scott v. Donald*, 165 U. S. 107, 114, 41 L. Ed. 648, 653, 17 Sup. Ct. Rep. 262; *Hutchinson v. Beckham*, 77 C. C. A. 333, 118 Fed. 399, 402; *Evenson v. Spaulding*, 9 L. R. A. (N. S.) 904, 82 C. C. A. 263, 150 Fed. 517, 520; *Hunt v. New York Cotton Exch.*, 205 U. S. 322, 336, 51 L. Ed. 821, 826, 27 Sup. Ct. Rep. 529.

"Counter affidavits were filed, tending to show that the expenses incident to compliance with the statute would be less than alleged; but it sufficiently appears that the value of the right of appellant to carry on his business, freed from the restraint of the statute, exceeds the jurisdictional amount."

It is clear from the facts in this case that it cost the operator of these motor vehicles more than $3,000.00 a year to comply with the said statute.

The amount to be paid under the New York statute would necessarily have to be paid to the insurance or surety company, and there, of course, would be no way by which the plaintiffs could recover the amount so paid. In the event the plaintiff complied with the law it could not sue the surety company for the return of its premium. In other words, the plaintiff would not have an adequate remedy at law, and in order to comply with the statute it would cost the plaintiff more than $3,000.00.

This is the holding of the Court in practically all of the cases cited in support of this decision.

In *Hunt vs. New York Cotton Exchange*, 205 U. S. 322, the New York Cotton Exchange filed its bill in equity in the Federal Court seeking to restrain a citizen of Tennessee from using the ticker service of a telegraph company. It appears that the New York Cotton Exchange had a contract with the telegraph company in which the exchange furnished the company the daily quotations on the cotton market; that the purpose of the contract was to control the distribution of the information furnished by the exchange.

Hunt, the appellant, prior to the expiration of this contract, had been receiving this information from the telegraph company. He had sought to enjoin the telegraph company from taking the service out of his place of business.

The purpose of the suit was to control the distribution of the information given by the exchange. The record shows that this right was worth more than $2,000.00. It further showed that the price to be paid the telegraph company under its contract with the exchange was less than $2,000.00. The Court held that the value of the right to control the market quotations was the amount in controversy.

The Court held as follows:

> "It is manifest that the injury to the exchange is not the rate paid by the appellant to the telegraph company. The purpose of the suit is to enjoin the appellant from receiving, using, or selling, directly or indirectly, the exchange's quotations, or permitting or maintaining any wire to his office over which the quotations are passing, or distributing the quotations, until he shall have acquired the right to receive them, either by contract of purchase from the exchange, or, with its consent and approval, from one of the [redacted]raph companies, authorized to distribute them. [redacted]other words, the object of the suit is to keep the control of the quotations by the exchange and its protection from the competition of bucket shops or the identity of its business with that of bucket shops."

In this case the plaintiffs could not escape the damages caused by a breach of its contract with the telegraph company by the payment of a fixed sum, neither could it recover the amount of damage caused to it by the breach of said contract.

In *Scott v. Donald*, 165 U. S. 107, the bill was filed in

equity by the plaintiff against various persons claiming to act as constables of the state of South Carolina, under what is known as the "Dispensary Law." An injunction was sought to protect the right of the plaintiff to import, for his own use, ales, wines, and liquors, the products of other states and foreign conutries. It was alleged in the bill that on several occasions packages of such wines and liquors belonging to complainant had been seized and carried away, and that complainant had instituted suits at law, and that notwithstanding such suits the constables of South Carolina continued to seize and carry away packages belonging to the complainant, and that protection of the complainant's right by actions at law involved, and would involve, a multiplicity of suits against the constables, and that the right to import wines, liquors, and other spirits was of the money value of upwards of $2,000.00, and also that articles to be imported in the future by the complainant from time to time were threatened to be seized by the constables, and that the value of these would exceed the sum of $2,000.00. The Court held in this case that the right of complainant to import wines, etc., was the amount in controversy. However, the officers of South Carolina denied that plaintiff had any right whatever to import any goods of this character. In other words, the State was acting to prevent the plaintiff from carrying on its business. The plaintiff could not, as in the case at bar, have secured this right by the payment of a small privilege tax.

In *Bitterman vs. L. & N. R. R. Co.*, 207 U. S. 204, it appears that the Railroad Company issued round-trip tickets; that such tickets were not transferable. Bitterman was engaged in the business of buying these tickets

and selling them to persons not entitled to receive them, and aiding the purchasers in the illegal use of them.

The Railroad Company sought to enjoin Bitterman from buying and selling these tickets. The Court held that the right of the railroad company to control the sale and use of tickets issued by it was the amount in controversy. In this case the railroad company could not, as plaintiffs could in the case at bar, stop Bitterman from his illegal traffic in railroad tickets by the payment of a fixed sum. See also *N. & P. Ry Co. vs. Walker*, 148 U. S. 391.

In the case of *City of Huchinson vs. Beckham*, 118 Fed. 399, Beckham sought to enjoin the City from the collection of a privilege tax which was less than $2,000.00 a year. The City contended that the amount in controversy was the amount of the tax, and was less than $2,000.00. The Court holds as follows:

> "Our attention has been invited to several cases which were brought to enjoin the collection of taxes that were alleged to be illegal, in which it was held that the amount in controversy for jurisdictional purposes was the amount of the tax (*Transfer Co. v. Pendergrass*, 16 C. C. A. 585, 70 Fed. 1; *Walter v. Railroad Co.*, 147 U. S. 370, 13 Sup. Ct. 348, 37 L. Ed. 206; *Railroad Co. v. Walker*, 148 U. S. 391, 13 Sup. Ct. 650, 37 L. Ed. 494); but an examination of these cases shows that they are not analogous to the case at bar, in that it did not appear that the complainants would sustain any other direct damage save the amount of the tax, which, if paid under protest, they could recover in an action at law, if the tax was found to be illegal. The present case is distinguishable

> from the cases relied upon by the appellants, in that the tax involved is a license tax imposed by a municipality upon a business concern, the payment of which tax may be enforced by fining and imprisoning tis employes and by daily arrests that will seriously interfere with the prosecution of complaints' business, and inflict a much greater direct loss than the amount of the tax."

The Court does not hold, as in the case at bar, that plaintiff could have escaped the penalties, criminal liabilities, etc., by the payment of a tax and have an adequate remedy at law to collect the same. However, this case is easily distinguishable from the case at bar, because under the statute in controversy only one penalty could be incurred and only one criminal prosecution could be had for failure to pay the tax.

In *Gramling vs. Maxwell,* 52 Fed. 2nd Series, 256, the statutory court held that in a suit to enjoin the collection of a privilege or license tax, the amount of the tax was the amount in controversy, and cites in support thereof the following cases:

Wheless vs. St. Louis, 188 U. S. 379;

Russell vs. Stansel, 105 U. S. 303;

Georgia Power Co. vs. Hudson, 49 Fed. 2nd, 66.

In *Berryman vs. Whitman College,* 222 U. S. 334, the College had been granted by contract perpetual existence and exemption from the payment of a tax. Twenty-three

years after the contract was made it was attempted to levy a tax on the property of the College. The suit was to enjoin the levy and collection of the tax on the ground that the contract had been violated. The Court held in this case that future taxes would be counted in determining the amount in controversy, or rather it held that the injunction was to prevent a breach of the contract, and the rights of the College under the contract determined the amount in controversy. The Court held as follows, and cited the following cases in support of its opinion:

> "Considering the averments of the bill, the amount and value of the property of the corporation, and the nature and character of the contract of exemption asserted, it cannot be doubted that the value of the thing in issue, the contract right, exceeded in value the jurisdictional amount. Granting that the uncertainties of the future and the shifting ownership of property forbids, in a contest merely over the validity of a tax, adding the sum of future taxes which might be levied to the amount of taxes actually levied for the purpose of jurisdiction, that principle can have no application to a case where the issue presented is not only the right to collect, but also to levy all future taxes. The admission that the right to tax may be abridged by contract, and that such contract may not be impaired without violating the Constitution, carries with it of necessity the power and duty to protect the contract right, and in the nature of things causes jurisdiction for such purpose to be measured by the value of some mere isolated element of that right."

New Orleans & Citizens Bank, 167 U. S. 371;

Deposit Bank vs. Frankfort, 191 U. S. 499.

However, the Court recognized that where the suit was to enjoin the collection of a tax and no contract was involved that the measure of damages was the amount of the tax, and cited the following cases so holding:

Holt vs. Indiana Manufacturing Co., 176 U. S. 68;

Clay Center vs. Farmers L. & T. Co., 145 U. S. 224;
New England M. S. Co. vs. Gay, 145 U. S. 123;
Citizens Bank vs. Cannon, 164 U. S. 319;
Rude vs. Westcott, 130 U. S. 153;
Walter vs. Northeastern R. Co., 147 U. S. 370.

I most respectfully submit that under the holdings of this Court the amount in controversy in this suit is the amount of the tax for each taxpayer, and this amount is less than $3,000.00, and this Court, therefore, has no jurisdiction.

CONCULSION.

I, therefore, most respectfully submit that this Court does not have jurisdiction because there are no equitable principles involved, and because the amount in controversy is less than $3,000.00.

Resptctfully submitted,

GEO. T. MITCHELL, Attorney General
And J. A. LAUDERDALE, Assistant
Attorney General,
Attorneys for Appellants.

APPENDIX A.

AN ACT to revise the Privilege Tax laws of the State of Mississippi and to repeal all laws in conflict therewith, and to provide penalties.

Section 3. PRIVILEGE TAXES IMPOSED.—Every person desiring to engage in any business, or exercise any privilege hereinafter specified, shall first, before commencing same, apply, for, pay for, and procure from the proper office a privilege license authorizing him to engage in the business, or exercise the privilege specified therein; and the amount of tax shown in the following schedules is hereby imposed for the privilege of engaging and/or continuing in the businesses set out therein.

SEC. 56. COTTON BUYERS.—Every person engaged in the business of buying or selling cotton for himself shall pay a privilege tax of one hundred ($100.00) dollars; but, where a cotton buyer only buys cotton from one gin in only one county or buys from the producers in only one municipality, said privilege tax is twenty-five ($25) dollars; the license must be issued in his name, and may be paid on or before the first day of September for a full year; only the municipality of his residence can collect a municipal privilege tax of him. Every individual, firm, partnership or corporation engaged in the business of buying or selling cotton shall take out in his or their name a state privilege tax of twenty-five ($25.00) dollars for every employee engaged in their business as buyer or seller, on or before the first day of September; such privilege tax shall authorize the buying or selling cotton by its bearer; and it shall be unlawful for any employee to buy or sell cotton without a priv-

ilege tax in his possession, issued in the name of his employer. Such license cannot be issued for less than a year.

If the individual, firm, partnership, or corporation take out a municipal privilege in his or their name for the municipality of the residence of their employee and take out also the state privilege tax imposed on them above, such employee shall have the authority to buy or sell cotton in any other municipality of the state, without paying any further state or municipal privilege tax.

But the above privilege taxes shall not be required of any landlord or other person who receives cotton in payment of accounts due him, nor of any merchant who pays a privilege tax on a store and who purchases only from the producer at the place of business of such merchant, nor to cotton mills domiciled in Mississippi where the cotton is purchased for manufacturing purposes.

SEC. 220. TAXPAYER TO APPLY FOR LICENSE.—Every person required to obtain a license for the privilege of engaging in any business for which a privilege tax is required shall make application therefor in writing to the officer who is required to collect the tax; which application shall be made on the form prescribed by the State Auditor of Public Accounts, except as otherwise provided by law, and which shall contain all the information necessary for the officer collecting the tax to properly classify the applicant or to ascertain the amount of tax due. The application shall be sworn to by the taxpayer, or any officer or duly authorized agent of the said taxpayer, which oath may be administered by any officer required by law to collect a

privilege tax. The application shall be accompanied by the amount of the privilege tax required by law. Any person who shall wilfully make any false statement in an application for a privilege license shall be guilty of a misdemeanor, and on conviction thereof shall be required to pay as damage double the amount of the difference between the tax paid and that which should have been paid, in addition to the fine and/or imprisonment imposed. The officer taking the application for privilege license shall carefully preserve the same for the use of the grand jury, the courts of the state and/or any duly authorized officer of the State of Mississippi. And any officer who shall refuse or wilfully fail to take or require the application or affidavit herein required shall be guilty of a misdemeanor and subject to the penalties therefor.

SEC. 224. OFFICER TO NOTIFY ALL PERSONS LIABLE FOR PRIVILEGE.—On or before the first day of each month the collector shall mail to each privilege taxpayer holding an annual license and whose license will expire during the following month, as shown by his record, a notice, that his license will expire and that a new privilege license must be procured during the said following month, and shall enclose therewith an application blank for a new license; but the failure to send or to receive such notice shall not exempt such privilege taxpayer from any penalties prescribed by law.

SEC. 225. DAMAGES AND PENALTY FOR FAILURE TO PROCURE LICENSE.—All persons liable for privilege taxes who shall fail to procure the license therefor before beginning the business for which a privilege tax is required by

law, or who shall fail to renew, during the month in which it is due, the license on a business for which he has theretofore procured a privilege license, shall in each or either such instance be liable for double the amount of the tax required for such business, and it is hereby made the duty of the collector whose duty it is to collect the tax on such business to collect the said tax penalty, issue a separate license for the tax, and for the penalty, and to endorse across the face of the license issued as a penalty the words: "Collected as Damages"; and they shall account for all such penalties, less commissions, as they are required to account for other privilege taxes. In addition to the hereinabove described penalties the delinquent taxpayer shall be guilty of a misdemeanor and subject to the penalties therefor.

SEC. 242. PENALTIES.—Any person violating any of of the provisions of this chapter shall be guilty of a misdemeanor and on conviction thereof shall be fined not more than $500.00 or imprisoned in the county jail not exceeding six months, or by both such fine and imprisonment in the discretion of the court within the limitations aforesaid; and such fine and imprisonment shall be in addition to any other penalty imposed by any particular section of this chapter (act). The courts of the county in which the offender resides, or if a company, in which it carries on business, shall have jurisdiction to enforce this section.

Section 3278, Code of 1930.

"Where any sheriff or tax collector has, or shall hereafter, by mistake or oversight, erroneously pay into the state treasurer any moneys on account of ad valorem or privilege taxes, such of-

ficer may make application to the auditor for repayment of such taxes, and the auditor and attorney-general shall thoroughly investigate such claim, and if found to be due the attorney general shall so certify to the auditor, who shall draw his warrant in favor of such sheriff, to be paid out of same fund in which it was erroneously paid into the state."

APPENDIX B.

The case of *Kroger Grocery and Baking Company v. John B. Lewis, et al.*, in the District Court of the United States for the Eastern District of Kentucky, was tried before a statutory court organized under Section 266 of the Judicial Code, before Moorman, Circuit Judge of the 6th Circuit, and Cochram and Dawson, District Judges, and decided on November 6th, 1931. This case has not yet been officially reported.

The court states the case as follows:

"In this action plaintiff, an Ohio corporation, owning and operating a chain of retail grocery stores in the United States, two hundred and sixty-three of which are located in different parts of the Commonwealth of Kentucky, attacks Chapter 149 of the 1930 Acts of the General Assembly of the Commonwealth of Kentucky, commonly known as the Retail Merchants' Gross Sales Tax Act, as violative of the Federal and State constitutions. The case is now before us on application of the plaintiff for an interlocutory injunction, under Section 266 of the Judicial Code (28 U. S. C. A., Section 380).

"At the threshold of the case we are met with the contention of the defendants that a Federal court of equity is without power to grant the relief sought, for the reason that the law of Kentucky affords plaintiff an adequate remedy at law for any injury sustained by it resulting from its enforced compliance with the terms of the Act. A decision of this question involves a construction of Section 10 of the Act, which reads as follows:

" 'No suit shall be maintained in any court to restrain or delay the collection or payment of the tax herein imposed upon any ground whatever, but the aggrieved tax payer shall pay the tax as and when due, and if paid under protest may at any time within two years from the date of such payment sue the Auditor of Public Accounts in an action at law to recover the tax so paid, with legal interest thereon from the date of payment. If it is finally determined that said tax, or any part thereof, was wrongfully collected for any reason, it shall be the duty of the Auditor of Public Accounts then in office to issue his warrant on the Treasurer of the Commonwealth of Kentucky for the amount of such tax so adjudged to have been wrongfully collected, together with interest thereon, and the Treasurer shall pay same out of the General Fund of the State. A separate suit need not be filed for each separate payment made by any taxpayer, but a recovery may be had in one suit for as many payments as may have been made, and which are not barred by the limitation of two years herein imposed'."

The court held that said statute was a plain, adequate and complete remedy at law and the Court was without equity jurisdiction.

Plaintiffs also contended that a court of equity had jurisdiction because of a multiplicity of suits and because it would suffer irreparable damages if it proceeded in an action or actions at law. However, the court held as follows:

> "Neither are we impressed with the contention of the plaintiff that Section 10 does not afford an adequate remedy at law, because under it a taxpayer would be compelled to resort to a multiplicity of suits to recover the various payments made under the Act. There is no necessity for a multiplicity of suits under Section 10. That section specifically provides that—
>
> "'A separate suit need not be filed for each separate payment made by any taxpayer, but a recovery may be had in one suit for as many payments as may have been made, and which are not barred by the limitation of two years herein imposed.'
>
> "This is the law even though such a provision had not been incorporated in Section 10. Therefore, the plaintiff may unite in one suit its claims growing out of each payment of taxes made under the Act up to the time of filing its suit, and that action would fully determine every question which could be determined in an equitable action. There would be no necessity for other suits, except possibly to avoid the running of the statute of limitations pending the final determination of the suit already filed. A court of equity will not interfere on the ground of multiplicity of suits, where such multiplicity consists of suits by the same plaintiff against the same defendant for causes of action arising out of the same facts and legal

principles. A multiplicity of suits in such a situation would be a multiplicity of the plaintiff's own making, and would afford no ground for equitable intervention. *Boise Artesian Water Co. v. Boise City*, 213 U. S. 276; *Standard Oil Co. v. Atlantic Coast Line Co.*, 13 Fed. (2d) 653. We will not assume that after the validity of the tax has been once definitely settled in an action at law, the State will make any attempt to enforce further collections.

"Finally, the fact that the Act imposes drastic penalties for failure to comply with its terms, and pay the tax when due, affords no basis for equitable intervention. The act visits these penalties upon the taxpayer only in event of failure to comply with its terms and pay the tax. To test the validity of this Act in an action at law, it is not necessary for the plaintiff to refuse to pay the tax and take the hazard of the courts deciding against him when the State undertakes in a legal action to enforce the penalties. All the taxpayor is required to do is to pay the tax, and when he has done this, he not only avoids the imposition of penalties, but has open to him a simple and direct way in a common law suit of attacking the validity of the law and of recovering the taxes paid, with interest thereon.

"We therefore conclude that the remedy afforded by Section 10 of the Act is an adequate one within the Federal rule, and the motion to dismiss the want of equitable jurisdiction must be sustained."

Appellants herein contend that this case sustains the

contention of appellants in argument under Points I-A, C, and D, and cite said cause in support of said contention.

Respectfully submitted,

GEO. T. MITCHELL, Attorney General
and J. A. LAUDERDALE, Assistant
Attorney General,
Attorneys for Appellants.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1931

No. 84

W. L. MATTHEWS, ET. AL.,
Appellants

vs.

J. F. RODGERS, ET. AL.,
Appellees

BRIEF FOR APPELLEES

J. W. CUTRER,
Of Counsel for Appellees.

EDWARD W. SMITH,
SAM C. COOK,
J. L. ROBERSON,
Attorneys for Appellees.

McCOWAT-MERCER, JACKSON, TENN.

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BRIEF FOR APPELLEES

STATEMENT OF FACTS ON THE MERITS.

I.

Appellants and Appellees entered into an agreed statement of the evidence. (Record Pages 28-42.)

The agreed stipulation, Paragraph II. thereof provides:

> "Except for the conclusions of law, which are denied by the answer filed herein, all of the facts stated in said Bill of Complaint are specifically admitted, except as the said report, of the said Joseph F. Ellis, should evidence the contrary." (Record Page 29.)

Attached as a part of the stipulation is the report of one Joseph F. Ellis, Certified Public Accountant, who

was mutually selected by all parties to audit the books of certain of the appellees, for the purpose of reflecting in said report the facts of the course of business of each of the appellees; it was agreed that the facts so reflected should be taken and considered as typical of the facts with reference to the course of business of each of said appellees.

II.

The established facts, therefore, are as follows:

The appellees are actively engaged in purchasing, selling and shipping cotton upon the market for cotton, which is now and has been for many years in the past maintained in the City of Clarksdale, Mississippi, as well as other Mississippi Delta cities and towns. (Record Page 3.)

Long Staple Delta Type cotton is practically the only product of the farms or plantations of the Delta section of the State of Mississippi, the annual crop approximating 700,000 bales of this peculiar kind and type of cotton; each bale being of the average weight of 500 pounds. The soil and climate of the said Mississippi Delta is peculiarly adapted to the growing of this peculiarly fine type and grade of cotton. None of this cotton is used or consumed locally, or within the State of Mississippi. All of the crop raised in the Delta of Mississippi, purchased by Cotton Buyers of the class of appellees herein, is purchased for shipment and actually shipped to terminal markets outside of the State of Mississippi.

When the cotton crop is harvested by picking, ginning and baling it at cotton gins, practically all of the cotton is delivered to warehouses and there stored, pending sale and shipment. Samples of said cotton are placed on the tables of Cotton Factors or Cooperative Associations, at which places, practically all of the sales are made.

The warehouses receive the bales of cotton from the producers, and after the cotton has been sold, compress the cotton to approximately one-third of its size, preparatory to loading and shipping it by rail to the terminal markets, on orders from the Cotton Buyers or the consumers. Loading of the cotton for shipment proceeds as rapidly as the consumer at the terminal market can receive the shipment. When loaded for delivery the cotton is sent promptly to the terminal market and is there either resold to the consumer, or delivered direct to the mill. In each instance, the cotton so purchased and shipped is for delivery and actually shipped to foreign markets, wholly without the State of Mississippi.

By general and uniform custom, bales of cotton are transported to compresses from the gin by rail, trucks or wagons. A compress is a combination storehouse and plant, equipped with machinery designed to compress bales of cotton under extremely high pressure, for the purpose of reducing their size. After compression a bale is approximately 18 inches thick. The purpose of compression is that the railroads and carriers by water, in interstate and foreign commerce, are thereby enabled to load into cars and ships for carriage approximately three times as much cotton, as otherwise would be possible.

At Clarksdale, there are two compresses owned and operated by a corporation existing under the Laws of the State of Delaware, to-wit: The Federal Compress & Warehouse Company. Said Federal Compress and Warehouse Company has, with reference to both and each of said compresses maintained at Clarksdale, complied with all of the terms and provisions of an act of Congress, the short title of which is the "United States Warehouse Act," being Chapter 10, Title 7, U. S. C. A. The said

Federal Compress and Warehouse Company complied with the terms and provisions of the said "United States Warehouse Act" for the reason that all of said cotton stored in the said compresses and/or warehouses at Clarksdale, Mississippi, and handled in the manner above described was and is cotton stored and handled therein for interstate and/or foreign commerce, and the power of Congress to affect, by provisions of its said act, the said cotton so handled and stored arises only from the fact, that said cotton and all of it is stored and handled for interstate and foreign commerce.

When cotton is delivered to said compresses, the said Federal Compress & Warehouse Company issues to the owner thereof warehouse receipts, which receipts comply in all things with the terms and provisions of said Act of Congress. Said cotton is universally sold upon the market by transfer and delivery of said warehouse receipts in accordance with the terms of said Act of Congress, and actual samples taken from said bales of cotton; said warehouse receipts being the evidence of the ownership of such cotton.

At Clarksdale, there exists an active market for the purchase and sale of said cotton between farmers raising said cotton and appellees and others engaged in like business, who are purchasing the same with the intention and purpose of selling and transporting same in interstate and foreign commerce, which is and was and has been a universal custom and course of business for more than twenty years past. The price at which said cotton is sold upon said market at Clarksdale is determined by the value of such cotton upon certain cotton exchanges, maintained, respectively, in the Cities of New Orleans, Louisiana, Chicago, Illinois and New York, New York; and there are maintained, in the City of Clarksdale,

Mississippi, offices of brokers who receive daily by wire quotations from such exchanges which fix and determine the price at which cotton is sold upon said Clarksdale market. All of said cotton, however, is bought by appellees with the uniform purpose and intention (which is and has been the universal course of business) to transport the same in interstate and foreign commerce to the mills located in the states upon the Atlantic seaboard, to-wit: Georgia, South Carolina, North Carolina, and Tennessee; and the mills of the New England States, to-wit: Massachusetts, Rhode Island, and Connecticut; and the mills of foreign countries. None of said cotton is spun or utilized within the confines of the State of Mississippi, or sold to or purchased by any consumer within the confines of the State of Mississippi.

Approximately seventy-five per cent of said cotton is delivered by rail to said compresses at Clarksdale, and upon delivery of such cotton to the said carrier by rail at points outlying said City of Clarksdale, said cotton thereupon is placed in and thereafter remains in the channels of interstate commerce. The said carrier transports by rail the said cotton to the compress at Clarksdale, and it is there concentrated merely for the purpose of compression and for the purpose of awaiting the determination of its final point of destination outside the State of Mississippi. When the destination of such cotton is determined, the carrier loads the same out on instructions of the then owner, after having the cotton compressed, and charges the through freight-rate from the point of origin within the State of Mississippi to the point of destination outside of the State of Mississippi, instead of charging the combination rate for carriage in intrastate commerce from the point of origin to Clarksdale, plus the charge for carriage in interstate commerce from Clarksdale to the point of destination. As for in-

stance: the rate for the carriage in intrastate commerce from Sumner, Mississippi, to Clarksdale, Mississippi, a distance of approximately twenty-five miles, of an uncompressed bale of cotton is $1.28 per hundred pounds. The through rate for the carriage of a compressed bale of cotton from Clarksdale, Mississippi, to Fall River, Massachusetts, is $1.28 per hundred pounds. The said carrier, instead of charging the combination rate above outlined for carriage from Sumner, Mississippi, to Fall River, Massachusetts, charges the through rate, which is the intermediate rate, as if there had been no interruption of shipment from Sumner, Mississippi, to Fall River, Massachusetts. The said charges are made by said carriers in accordance with the regulations prescribed by the Interstate Commerce Commission in pursuance of the Act of Congress creating said Commission and the several amendments thereto.

The general and uniform custom and course of business in handling said cotton upon said market is had and done in the following manner:

The farmer causes warehouse receipts, when the cotton is delivered to the compress, to be issued and delivered either directly to himself or his agent, commonly called a cotton factor. Upon the Clarksdale market, there are approximately twenty-five buyers and shippers who are engaged in the sole business of buying, selling, and shipping cotton in interstate and foreign commerce. The farmer or the factor causes the actual bales of cotton to be sampled, and the cotton is sold to the appellees and other buyers, sellers, and shippers upon said market, upon the basis disclosed by the character of the samples of said cotton, and by endorsement and delivery of the said cotton receipts evidencing the ownership of the same, the price therefor being governed by the markets

in New York, Chicago, and New Orleans. It is uniformly known and understood by the farmer, cotton factor, and the buyer that the buyer is purchasing said cotton solely for the purpose of causing the same to be transported by rail and/or water to said points in the United States and foreign countries where mills convert said cotton into textile products. No cotton that is bought and/or sold upon the Clarksdale market is utilized in the State of Mississippi, but all of said cotton is transported for consumption in interstate and foreign commerce.

The general and uniform custom among buyers, shipper and sellers, as well as the general course of business, is that a buyer enters into a contract for either the future or immediate delivery of a certain number of bales of cotton of a certain grade, class and staple, obligating himself by such contract to deliver to a mill in a foreign state or country such cotton at a given price. Thereupon, such buyer will go upon the market at Clarksdale, and purchase cotton of the kind and character which he is obligated to his customer to deliver, and will cause the delivery of said cotton in interstate and/or foreign commerce in accordance with the terms of his contract. A very small proportion of the cotton purchased by shippers, and cotton buyers (not exceeding ten per cent) is bought when no contract for the sale thereof exists. In such cases, it is bought with the sole anticipation and intention on the part of the buyer (which intention is fully known both to the farmer, buyer and/or factor) to procure a sale of said cotton to some foreign cotton mill or foreign cotton merchant, and to cause the same to be transported in interstate and/or foreign commerce, at such time as market conditions will justify. Appellees have engaged in the business of buying and selling cotton in this manner, upon the markets hereinabove described, for periods ranging from five to more than twenty years.

The business of appellees is commonly known as that either of a cotton buyer, cotton shipper, or words of like import.

In order to acquire a successful business as a cotton buyer, one is first required to spend from three to five years, practically without compensation, in perfecting himself in the knowledge of the various classes, grades, and staples of cotton; likewise, in order to acquire a successful business as a cotton buyer, it is necessary for one to establish what is commonly known in the trade as connections in the various terminal markets where cotton is converted into textile products, as aforesaid. These connections refer to customers; that is, either mills or cotton merchants in foreign terminal markets, who habitually do business with a given buyer or shipper. It is a matter of extreme difficulty for one to establish such connections, and an established business as a cotton buyer is measured, as to value, by the amount of cotton, which such buyer is able to sell through the connections, which he has established by his attention to his business. Appellees are each and all established cotton buyers and shippers engaged in the said business, having established outlets and connections for the ultimate sale and consumption of cotton purchased by them upon the market aforesaid. The business of each individual appellee herein necessarily varies, but the annual business of the appellees herein range from five thousand bales to twenty-five thousand bales each. A reasonable profit for a cotton buyer, in buying and reselling a bale of cotton upon said market in the manner aforesaid, is not less than $2.50 per bale.

This method of purchasing, shipping and selling is the universal course of business in the cotton trade of appellees and others similarly situated.

The above statement substantially reflects the allegations of fact alleged in the Bill of Complaint and agreed to be the facts governing the case, as reflected by the stipulation of counsel, at Page 29 of the Record, except as the report of Joseph F. Ellis, Certified Public Accountant, should evidence the contrary.

STATEMENT OF REPORT OF JOSEPH F. ELLIS

I.

This report in no wise contradicts or modifies the facts stated in the Bill of Complaint, as above related; but merely reflects the exact course of business of the appellees and varies only from the allegations of the Bill of Complaint in that it reflects that in the course of business of H. J. Murff Cotton Company, all of the cotton purchased by this firm, consisting of 15,173 bales of cotton of the value of $1,874,004.85, was actually purchased and shipped out of the State of Mississippi to foreign countries and foreign states on orders of foreign brokers or consumers, against which the cotton was purchased; the only exception being that of the total number of bales thus purchased, during the fiscal year ending August 31, 1930, 278 bales of the value of $34,335.50 were disposed of locally, which latter number of bales consisted of 1.84 per cent of the entire business of H. J. Murff Cotton Company. (Record Pages 31-32.)

The report likewise reflects that the 278 bales sold locally were disposed of to other cotton buyers, for the reason that this cotton was not deliverable on contracts had by H. J. Murff & Company, and for which H. J. Murff & Company had no use whatever. These bales

constituted what is known in the cotton trade as "Overs." (Record Page 34.)

These "Overs" constitute that small proportion of cotton which is bought in lots and which is left on the hands of the cotton buyer, which do not "come up" to the type, grade or staple deliverable on contracts.

The report of Ellis also shows that all of the cotton so purchased is ultimately shipped out of the State of Mississippi to customers of appellees, on such dates as called for by the contracts against which the cotton is purchased, and only is stored temporarily in the Federal Compress & Warehouse Company, to await shipment in conformity with such contracts.

Ellis' report likewise discloses the same course of business in the case of B. F. Oliver & Company, the other of appellees audited, except that owing to an exceptional season, beginning in 1930 up to the date of the filing of the report, approximately 10 per cent of the purchases of B. F. Oliver & Company constituted "Overs," or cotton which did not fit contracts, and which was disposed of locally to other Cotton Buyers. (Record Pages 36-38.)

The matter of "Overs" disposed of, as an incident to the business of appelles, is fully explained by Ellis' report on Pages 38 through 39 of the record.

POINT I.

DOES THE MATTER IN CONTROVERSY IN THIS CASE EXCEED THE SUM OR VALUE OF THREE THOUSAND DOLLARS?

We first direct our attention to the above question in view of the rule of this court that the question of its jurisdiction and of the jurisdiction of the court below

is always the first matter inquired into. Counsel for appellants, in support of the negative of the question, cite a number of cases from this court which in substance establish beyond controversy the following well-recognized and undisputed propositions:

1. In a suit to enjoin the collection of a tax, usually an ad valorem tax, the amount of the tax is determinative of the amount or value in controversy.

2. In a suit by one plaintiff as against several distinct taxing officers or districts whose duties are not related and against whom a joint suit for the recovery of the taxes would not lie, the amount of the taxes may not be added together in order to attain the necessary jurisdictional amount.

3. In a suit by several plaintiffs against one or more defendants whose interests are not joint, the amount of tax claimed or asserted as against each separate plaintiff is determinative of the question of the amount in controversy.

We fully recognize all of the rules above stated, and were fully appreciative of these rules at the time of the filing of the bill in the present case. Manifestly, if the amount of tax, to-wit: One Hundred ($100.00) Dollars, as against each of the appellees, is to be taken as determinative of the amount in controversy, the court below was without jurisdiction. Such, however, we respectfully submit is not the rule to be applied to the peculiar facts of the case at Bar.

Before adverting to the authorities which we shall insist fully sustain the jurisdiction of the court below, we desire to impress upon the court the following facts alleged in the original bill and admitted by agreed statement of evidence (R. 28).

1. The matter in controversy exceeds the value of Three Thousand ($3,000.00) Dollars (R. 2).

2. The appellants were threatening, at the time of the filing of the bill, to deprive appellees of the right to earn their livelihoods, which right was of the value of more than Three Thousand ($3,000.00) Dollars (R. 3).

3. The provisions of Chapter 88 of the Laws of the State of Mississippi of 1930 (see appendix to appellants' brief and this brief) required appellees to make application in writing to appellant Matthews for a privilege license to engage in the business of cotton buyer; required of appellees, as a condition precedent to engaging in such business, both the making of the application and the payment of a privilege tax of One Hundred ($100.00) Dollars. (R. 10).

4. Said statute provides, in the event of the failure on the part of appellees to make such application and pay such tax, for criminal prosecution whereby each of appellees might be punished by fine of not more than Five Hundred ($500.00) Dollars and/or imprisonment in jail for not exceeding six (6) months (R. 10).

5. Said statute also provides that, in the event of the failure of appellees to pay the privilege license above referred to before October 1st, 1930, a penalty of Two Hundred ($200.00) Dollars be imposed for each day that appellees might engage in such business (R. 10).

6. Said statute likewise provides for the payment by each of the appellees of Twenty-Five ($25.00) Dollars on or before October 1st, 1930, for each employee employed by them as a buyer or seller of cotton, with like penalties in the event of the failure to pay the last mentioned tax (R. 11).

7. The appellants, at the time of the institution of this suit, were threatening appellees with the en-

forcement of each of the above mentioned provisions of the Act, and in addition thereto, were threatening the issuance of warrants of distress, and threatening to levy such warrants of distress upon the real and personal property of each of the appellees (R. 11-12).

8. In the event of appellants' carrying out the threats above described, the business of each of the appellees would be seriously impaired if not destroyed; that a loss or suspension of the business of each of them for a period of thirty days would cause great damage, and that in any event, each of the appellees would be damaged in excess of Three Thousand ($3,000.00) Dollars (R. 15).

9. The active business period of the appellees begins about September 1st of each year, and extends through March 1st of the succeeding year (R. 15).

We make the assertion that each of the foregoing facts are both alleged and admitted. We rely upon the admission contained in the agreed statement of evidence (R. 28), for the reason that in such agreed statement, it is agreed that all facts stated in the bill of complaint are true unless the report of Jos. F Ellis, heretofore referred to, should evidence the contrary. The report of Mr. Ellis has no tendency to contradict any one of the foregoing facts, but on the contrary, in many particulars substantiates such facts.

With these admitted facts in mind, it is the contention of appellees that the true matter in controversy in this cause is not the amount of the tax, but the right of appellees to engage in business free from the interference prescribed by the above mentioned Chapter 88 of the Laws of 1930.

We now turn to the authorities substantiating this proposition:

27 *R. C. L.*, 32:

"34. IN GENERAL.—Where jurisdiction is dependent on the amount in controversy the substantial character of the jurisdictional averment in the bill is to be tested, not by the mere immediate pecuniary damage resulting from the acts complained of, but by the value of the subject matter to be protected and the rights of property which the complainant seeks to have recognized and enforced. This principle has been applied in suits for an injunction to restrain a nuisance, a continuing trespass, or the like, it being the rule that the jurisdictional amount is to be tested by the value of the object to be gained by the complaint. So where the value of a contract right to perpetual exemption from taxation exceeds the jurisdictional amount, the fact that the particular tax assessed and levied is less than the required amount is not controlling. And where the matter in dispute is alleged to be in excess of the sum required, jurisdiction is not terminated by ex parte affidavits denying that the property is of the value alleged, unless this fact is made to appear to the satisfaction of the court. Nor can a suit properly be dismissed as not involving a controversy of an amount sufficient to come within the court's jurisdiction, unless the facts, when made to appear on the record, create a legal certainty of that conclusion. Furthermore it is decided that an apparent defect of jurisdiction dependent on an inquiry into facts which might or might not show a matter in controversy of sufficient pecuniary value cannot be availed of except by appeal or writ of error, and does not render the judgment or decree of the court a nullity. The limitation, however, as to the amount necessary to confer jurisdiction has been held not to apply to suits in which the United States is plaintiff or petitioner."

Berryman v. Whitman College, 222 U. S. 334. This case was a suit by Whitman College, instituted in the Circuit Court of the State of Washington, to enjoin the collection of taxes amounting to $946.32 on the ground that the levy of the taxes constituted the impairment of a contractual obligation whereby the State of Washington had undertaken to give to the college perpetual exemption from taxes levied by the State. Attack was made on the jurisdiction of the court on the ground that the jurisdictional amount was not involved. We quote in part from the opinion of the court by White, Chief Justice:

> "The taxing officers of the county of Walla Walla, the defendants below and appellants here, insist that we may not review the merits, because the court below had no jurisdiction over the cause, and therefore we must reverse and remand, with directions to dismiss the bill. This rests upon the proposition that, as the tax was below the jurisdictional amount, it afforded no basis for jurisdiction. The sum of the levied tax, it is urged, could not be increased by considering the power of taxation which might be exerted in other taxing districts, or by adding taxes which, if the right to tax existed, might be assessed and levied in future years. This, it is insisted, is not only sustained by reason, but is sanctioned by prior decisions of this court.
>
> "Both assumptions are wrong. The first, because it misconceives the character of the relief prayed, which was the enforcement of a contract exemption during the perpetual life of the corporation, and as broad as its power to acquire and hold property.
>
> "Considering the averments of the bill, the amount and value of the property of the corporation, and the nature and character of the contract of exemption asserted, it cannot be doubted that the value of the thing in issue, the contract right, exceeded in value the jurisdictional amount. Granting that the un-

certainties of the future and the shifting ownership of property forbids, in a contest merely over the validity of a tax, adding the sum of future taxes which might be levied to the amount of taxes actually levied for the purpose of jurisdiction, that principle can have no application to a case where the issue presented is not only the right to collect, but also to levy all future taxes. The admission that the right to tax may be abridged by contract, and that such contract may not be impaired without violating the Constitution, carries with it of necessity the power and the duty to protect the contract right, and in the nature of things causes jurisdiction for such purpose to be measured by the value of the right to be protected, and not by the value of some mere isolated element of that right. And the doctrine just cited has been applied in two cases so obviously in principle like this as practically to foreclose the question. * * *

"We state in the margin the cases principally relied upon to support the contention as to the want of jurisdiction. It would suffice to say of these cases that if they supported the proposition which they are cited to maintain, they have been qualified and restricted by the cases which we have just reviewed. But such result is uncalled for, as an analysis of the case will show that all of them considered, in the absence of contract, where the right to levy a particular tax was assailed, whether there was authority to make up the jurisdictional amount required, by calling into the consideration the influence which the judgment might have upon different taxes the power to take in view future illegal taxes, upon the theory that they might be levied." (The cases placed in the margin by the court are those headed by *Holt v. Indiana Mfg. Co.*, 176 U. S. 68.)

It is thus apparent that, in *Berryman v. Whitman College*, supra, the suit was one primarily to protect the contractual right to exemption from ad valorem taxes,

and secondarily to enjoin the present collection of a tax of less than $1,000.00. The present case is one seeking, as we submit, to protect the constitutional right of engaging in interstate commerce free from a burden placed thereon by the state. We submit that there is no difference in principle in the two rights and in determining the true matter in controversy.

Hunt v. New York Cotton Exchange, 205 U. S. 322, is an oft-cited case on the question of the amount in controversy. In that case, the New York Stock Exchange sought to enjoin one Hunt from receiving and using quotations made upon the exchange. The amount in controversy was determined to be not $300.00 per annum which the defendant paid for receiving them from the telegraph company, but the value to the exchange of the right to control the distribution of its quotations, and, as that exceeded $3,000.00, the jurisdiction was sustained.

> "In other words, the object of the suit is to keep the control of the quotations by the exchange and its protection from the competition of bucket shops or the identity of its business with that of bucket shops. And the right to the quotations was declared, as we said in Board of Trade v. Christie Grain & Stock Co., to be property, and the exchange may keep them to itself or communicate them to others. The object of this suit is to protect that right. The right, therefore, is the matter in dispute, and its value to the exchange determines the jurisdiction, not the rate paid by appellant to the telegraph company. The value of the right was testified to be much greater than $3,000. In Mississippi & M. R. Co. v. Ward, 2 Black, 485, it was decided that jurisdiction is tested by the value of the object to be gained by the bill. To the same effect is Board of Trade v. Cella Commission Co., 145 Fed. 28. In the latter suit the Chicago Board of Trade obtained

> a decree restraining the use of its continuous quotations by the Cella Commission Company. It was said that the amount or value of such right is not the sum a complainant might recover in an action at law for the damage already sustained, nor is he required to wait until it reaches the jurisdictional amount. The latter declaration is supported by Scott v. Donald, 165 U. S. 107."

The same doctrine is supported by *Butterman v. Louisville etc. Railroad Co.*, 207 U. S. 205; *Brown v. Trousdale*, 138 U. S. 389.

Packard v. Banton, 264 U. S. 140, was a suit instituted to enjoin the enforcement of a statute of the State of New York which required the plaintiff, as an operator of motor vehicles for hire, to file with the State Tax Commission a bond made by a surety company, conditioned for the payment of a judgment, in the event of recovery against the operator by any person because of negligence or defective construction of the vehicle. The statute was attacked on the ground that it was in contravention of the equal protection of the laws and the due process clause of the 14th Amendment.

Objection was made that the requisite jurisdictional amount was not involved for the reason that the amount necessary to satisfy the bond, according to the statement of the plaintiff, amounted to only $960.00. It was alleged that the necessity of paying the premium on the bond reduced the net income of each taxi-cab by some $18.50 per week. Plaintiff operated four taxi-cabs.

> "1. Appellees insist that the district court was without jurisdiction because the matter in controversy does not exceed the value of $3,000. Judicial Code, Sec. 24, subd. 1. The bill discloses that the enforcement of the statute, sought to be enjoined,

will have the effect of materially increasing appellant's expenditures, as well as causing injury to him in other respects. The allegations, in general terms, are that the sum or value in controversy exceeds $3,000, which the affidavits filed in the lower court tend to support; that appellant is the owner of four motor vehicles, the income from which would be reduced, if the law be enforced, to the extent of $18.50 each per week; and that his business would otherwise suffer. The object of the suit is to enjoin the enforcement of the statute, and it is the value of this object thus sought to be gained that determines the amount in dispute. Mississippi & M. R. Co. v. Ward, 2 Black, 485; Texas & P. R. Co. v. Kuteman, 54 Fed. 547, 552; Nashville, C. & St. L. R. Co. v. McConnell, 82 Fed. 65, 73; Scott v. Donald, 165 U. S. 107, 114; Hutchinson v. Beckham, 118 Fed. 399, 402; Evenson v. Spaulding, 150 Fed. 517, 520; Hunt v. New York Cotton Exch. 205 U. S. 322, 336."

It will be observed that the Supreme Court, in *Packard v. Banton,* supra, especially approved *Hutchinson v. Beckham,* 118 Fed. 399. This case was a suit instituted by the plaintiff seeking an injunction to restrain the enforcement of an ordinance levying a license tax upon the plaintiff amounting to $1,200.00 per year, on the principal ground that the imposition of the tax was a burden on the business of plaintiff who was engaged in interstate commerce. We quote at length from the opinion in this case:

"Concerning the last of these questions, which will be noticed first, it is quite sufficient to say that the complaint which was filed in the lower court may be appropriately termed a 'bill of peace.' Story, Eq. Jur. Sections 852, 853. It was filed to obtain a definite determination that the ordinance complained of was void, also to prevent harassing litigation, and to establish the complainants' right to transact business in the city of Hutchinson, as it had been

doing for some years, without complying with the terms of the ordinance. One paragraph of the bill, as heretofore shown, alleged that the city authorities, for the purpose of enforcing compliance with the ordinance, had already caused the arrest of their agents, and were threatening to make further like arrests, and to institute numerous criminal prosecutions, and thereby prevent them from receiving, storing, and making speedy deliveries of goods, as had been their habit. Now, conceding that the validity of the ordinance might have been tried in any one of the criminal prosecutions thus brought by the city, yet, as the right of appeal existed from any judgment which might have been rendered therein, it is apparent that months, and possibly some years, might have elapsed before the invalidity of the ordinance would have been definitely established, and that in the meantime the complainants might and probably would have been compelled to defend a multitude of suits, and submit to daily interruptions of their business, which would have proven to be very annoying, and probably disastrous. In such a case, the rule that a suit in equity will not lie to restrain the collection of an illegal tax, merely on the ground of its illegality, does not apply, because circumstances are alleged which show that if left to their remedy at law the complainants would probably be subjected to numerous prosecutions, besides sustaining great and irreparable loss in the prosecution of their business. When, in addition to the fact that an illegal tax has been imposed, it further appears that the persons or corporations upon whom it is imposed will be called upon to defend a multitude of suits, or that they will sustain great injury if the state or municipality is left free to enforce the tax by the usual remedies, courts of equity never hesitate to assume jurisdiction and grant injunctions against those who are seeking to enforce the collection of the tax if it appears to be clearly illegal. Dows v. City of Chicago, 11 Wall. 108; Railway Co. v. Cheyenne, 113 U. S. 516, 525; City of Ogden v.

Armstrong, 168 U. S. 224, 239, 240; Heywood v. City of Buffalo, 14 N. Y. 534.

"The other and broader objection to the jurisdiction, that the amount in controversy is inadequate to confer jurisdiction upon the federal court, is based upon the ground that as the bill was filed on August 29, 1900, and the tax from June 1, 1900, to December 31, 1900, was only $500, that was the sole sum in controversy. Counsel for the city say it was only claiming at the time $500, and that the right to collect that amount from the complainants was the only matter in controversy. We think, however, that this view of the case is too narrow and technical. The right which the complainants asserted was the right to transact their business in the city of Hutchinson as theretofore, without being subjected to the onerous and discriminating tax which the municipality had seen fit to impose. They averred that, if the city was left at liberty to enforce the tax in its own way by making daily arrests of its employees, they would eventually quit its service; that the complainants and all other nonresident merchants in their situation would be subjected to the cost and annoyance of defending repeated suits; that they would also be prevented from carrying on their business as they had theretofore done; that they would be compelled to transact business in competition with dealers residing in the city of Hutchinson who were not subject to the tax; and that in this way they would sustain damages in a sum exceeding $2,000. These allegations were admitted by the demurrer to be true if they were material allegations. From the complainants' standpoint, therefore,—and the case must be judged from their standpoint, and not exclusively from the standpoint of the city,—the amount involved in the litigation was not merely the license tax of $500 which accrued on June 1, 1900, but it was the total amount of their loss incident to the causes aforesaid, if the bill was not entertained, and if the city was left free to pursue its

own course in enforcing the ordinance. Our attention has been invited to several cases which were brought to enjoin the collection of taxes that were alleged to be illegal, in which it was held that the amount in controversy for jurisdictional purposes was the amount of the tax (Transfer Co. v. Pendergrass, 70 Fed. 1; Walter v. Railroad Co., 147 U. S. 370; Railroad Co. v. Walker, 148 U. S. 391); but an examination of these cases shows that they are not analogous to the case at bar, in that it did not appear that the complainants would sustain any other direct damage save the amount of the tax, which if paid under protest, they could recover in an action at law, if the tax was found to be illegal. The present case is distinguishable from the cases relied upon by the appellants, in that the tax involved is a license tax imposed by a municipality upon a business concern, the payment of which tax may be enforced by fining and imprisoning its employees and by daily arrests that will seriously interfere with the prosecution of complainants' business, and inflict a much greater direct loss than the amount of the tax. The suit at bar, in view of the allegations touching the effect upon the complainants' business, if the city is permitted to proceed with the enforcement of the ordinance in its own way, is in reality a bill to prevent the city from breaking up and destroying an established business under the guise of enforcing an illegal ordinance. The pecuniary loss which the complainants would sustain by such an interference with or destruction of their business may, as we think, be properly taken into account in determining the amount in controversy; and, as the bill alleges and the demurrer admits that the damages incident to such wrongful conduct on the part of the city will exceed $2,000, we are of the opinion that the jurisdiction of the federal court to entertain the bill was rightfully upheld. The decree below is accordingly affirmed."

(See to the same effect *Southern Exp. Co. v. Ensley*, C. C. Ala., 1902, 116 Fed. 756.)

"Where, in an action by a foreign express company engaged in interstate commerce against a city to restrain the enforcement of an ordinance exacting a license fee, the bill states that the value of the company's right to do business in such city exceeds the jurisdictional amount, the federal court has jurisdiction, though the amount of the license fee is less than such amount. *City of Hutchinson v. Beckham*, (Kan. 1902) 118 Fed. 399; *Southern Exp. Co. v. City of Ensley*, (C. C. Ala. 1902) 116 Fed. 756."

"In a suit to enjoin the enforcement of a city ordinance alleged to impose a tax on interstate commerce, federal jurisdiction was determined by the value of the right to be protected, and not the amount of the tax to be enjoined. *Jewel Tea Co. v. Lee's Summit*, Mo. (D. C. Mo. 1912) 198 Fed. 532, affirmed (C. C. A. 1914) 217 Fed. 965."

"In a suit to enjoin the enforcement of an ordinance imposing a license tax on complainants' business, alleged to be prohibitory, the amount in controversy, for the purpose of determining the jurisdiction of a federal court, is the value of such business. *Humes v. City of Little Rock* (C. C. Ark. 1898) 138 F. 929."

Real Silk Hosiery Mills v. Portland et al., 268 U. S. 325, is a case in which plaintiffs sought to enjoin the enforcement of a license tax by the City of Portland amounting to $12.50 quarterly upon twenty of its employees or agents. The court sustained the injunction on the ground that the tax was a burden on interstate commerce. It is true that the amount was not questioned in the court, but, unless the court had been of the opinion that the right to do business was the determinative question, it could not have sustained the jurisdiction unless

either it was of the opinion that the value was more than $3,000.00, although the tax was much less, or the suit was one authorized to be brought under Section 41 (14), Title 28, U. S. C. A.

In the case of *New York Life Insurance Co. v. Swift*, 38 Fed. (2nd) 175, decided by the Fifth Circuit Court of Appeals on February 10th, 1930, the doctrine of these cases is expressly approved in these words:

> "In a suit to prevent a future loss or damage to the plaintiff, the object to be gained by the bill is the test of the jurisdictional amount; in other words, the value of the right to be protected. If that exceeds $3,000, the District Court has jurisdiction regardless of the amount of damage that has presently accrued," citing the cases from the Supreme Court upon which we rely.

Cudahy Packing Co. v. Hinkel, 278 U. S. 460, was a suit by the Packing Company to enjoin, as a burden on interstate commerce, a filing fee amounting to $545.00 and a license fee or tax amounting to $580.00. These two amounts were the total amount of taxes involved in the case. The Supreme Court, although not mentioning the matter of the amount in controversy, reversed the lower court and directed the issuance of a permanent injunction enjoining and restraining the collection of the tax. The same case in the court below is reported in 24 Fed. (2nd) 124. The facts alleged in the bill are identical with those alleged in the case at bar in that they alleged that the enforcement of the civil and criminal provisions of the statute would interfere with, if not destroy, the business of the plaintiff.

In addition to the foregoing authorities, we ask the court to consider the following:

Scott v. Donald, 165 U. S. 107.

Western & Atlantic R. R. v. Railroad Commission of Ga., 261 U. S. 264.

Glenwood Light & Water Co. v. Mutual Light, Heat & Power Co., 239 U. S. 121.

Adams v. New York Trust Co., 37 Fed. (2nd) 826 (5th Circuit).

Campbell Baking Co. v. City of Maryville, 31 Fed. (2nd) 466 (District Court, Missouri).

The following cases were expressly approved by the Supreme Court in *Packard v. Banton*, supra:

Nashville, etc. R. R. Co. v. McConnell, 82 Fed. 65 (See page 73.)

Texas & Pacific R. R. Co. v. Kuteman, 54 Fed. 547 (5th Circuit) (See page 552.).

Evenson v. Spaulding, 150 Fed. 517.

We undertake only a very slight review of these cases.

In *Scott v. Donald*, supra, the right involved was the right to import liquors into the State of South Carolina free from the restrictions of its dispensory law. It is true that it was agreed that that right was worth more than $2,000.00. In the case at bar, the admission of the motion to dismiss has the same effect as an agreement.

In *Glenwood Light etc. Co. v. Mutual Light etc. Co.*, supra, the right involved was the right to an injunction enjoining interference with plaintiffs' electric light poles and wires. The lower court went off upon the proposi-

tion that the jurisdictional amount was fixed by the cost to the defendant of removing the poles, etc. which it had erected. The Supreme Court said that the true test was the value of the object of the suit, or the value of the right to be maintained.

In *Western & Atlantic R. R. v. Railroad Commission*, supra, the right involved was one to an injunction restraining the State Railroad Commission from enforcing the erection of a sidetrack costing $1,266.24.

In *The Campbell Baking Co. v. City of Maryville*, the right involved was that to an injunction enjoining the enforcement of an ordinance levying a privilege license of $200.00 annually on a business whose net profits amounted to $357.00. In this, as in all of the cases to which we have referred, the court held that the requisite jurisdictional amount was involved.

In *Texas & Pacific R. R. Co. v. Kuteman*, supra, the Circuit Court of Appeals for the Fifth Circuit reiterated the rule for which we contend on page 552: that in a suit for an injunction, the amount in the suit is the value of the object to be gained by the bill.

POINT II.

IS THE RIGHT, PRIVILEGE, OR IMMUNITY ASSERTED ONE SECURED BY THE CONSTITUTION OF THE UNITED STATES WITHIN THE PURVIEW OF SECTION 41 (14), Title 28, U. S. C. A.?

Under this provision of the jurisdictional statute, the actual amount in controversy is immaterial. The jurisdiction of the court below was based in the bill upon the above mentioned fact (R. 3).

"SUIT TO RESTRAIN ENFORCEMENT OF UNCONSTITUTIONAL LAW.—The federal court has jurisdiction of a suit brought against an officer of the state to restrain the enforcement of a law upon the ground that such law is in violation of the Constitution of the United States. Crane v. Johnson (D. C. Cal. 1916) 233 F. 334, (affirmed (1917) 242 U. S. 339, and (1917) 242 U. S. 344), following Truax v. Raich (Ariz. 1915) 239 U. S. 33, which affirmed (D. C. Ariz. 1915) 219 F. 273."

Terrace v. Thompson, 263 U. S. 197, was a case which, of course, caused a great deal of comment in this country. It was a suit by a citizen of Washington and a subject of Japan to enjoin the enforcement of the statute passed by the State of Washington, the manifest intent of which was to deprive Japanese of the right to own lands or the right to engage in the business of farming. The report of the case makes no reference to any value involved. The jurisdiction of the court was vigorously challenged.

"Equity jurisdiction will be exercised to enjoin the threatened enforcement of a state law which contravenes the Federal Constitution wherever it is essential, in order effectually to protect property rights and the rights of persons against injuries otherwise irremediable; and in such a case a person who, as an officer of the state, is clothed with the duty of enforcing its laws, and who threatens and is about to commence proceedings, either civil or criminal, to enforce such a law against parties affected, may be enjoined from such action by a Federal court of equity."

POINT III.

IS THERE EQUITY UPON THE FACE OF THE BILL?

Counsel for appellants proceed upon the theory that the only ground for equitable relief alleged in the bill was

that to prevent a multiplicity of suits. In this they are mistaken.

The following equitable grounds were pleaded and relied upon in the court below.

1. Prevention of a multiplicity of suits (R. 12-13).

2. There is no adequate remedy at law for the reason that appellees were without remedy in any event to collect the commissions allowed appellant Matthews, Tax Collector, amounting to ten (10%) per cent of the amount collected, and no remedy allowed by the Laws of the State of Mississippi to recover any damages that might be assessed against them (R. 14-15).

3. By the Laws of the State of Mississippi, the right and remedy to restrain the enforcement and collection of an illegal tax is enlarged, and the right of injunction is granted, which right may be enforced in the courts of the United States (R. 15).

4. The imminent danger of irreparable damage to appellees by reason of the impairment or destruction of their business for which no remedy existed (R. 15).

5. Irremedial damage to appellees in that the enforcement of the statute would interfere with the fulfillment of contracts made by them then outstanding, for which no remedy at law existed (R. 15-16).

6. Prevention of a multiplicity of suits from an angle different from that presented under 1 (R. 16).

We undertake to discuss such of these grounds of relief as we believe necessary.

(a). Multiplicity of suits.

We quote *32 Corpus Juris*, 89:

> "WHAT CONSTITUTES A MULTIPLICITY OF SUITS, such as to justify the interference of equity, cannot be determined by any fixed rule. It has been said that each case apparently is made to stand on its own peculiar facts, at least if the case is not brought directly within the principle of some preceding case. Before several actions at law will be enjoined in order that the controversies may be determined in a single suit, it must appear that the different suits may be determined by the settlement of one or more issues of law or fact common to them all. The mere fact that there is a multitude of actions does not in itself constitute multiplicity of actions in such sense that equity will enjoin them. The bringing of several suits will not be enjoined merely for the purpose of preventing costs or expenses of separate actions."

Pomeroy's Equitable Remedies, Vol. 1, Sec. 372, page 658:

> "MULTIPLICITY OF SUITS.—This ground of jurisdiction has met with abundant recognition in cases of the 'Second Class' and of the 'Fourth Class'; but appears to have been rejected in one case of the 'Third Class,' where the equity arises from the fact that the burden of an illegal tax falls on numerous individuals in the same way. This class is, at any rate, confined to cases where the tax as a whole is invalid, and in any event the jurisdiction is asserted to prevent a probable, not a possible, multiplicity of suits."

In *Hale v. Allison*, 188 U. S. 56, we quote from the opinion:

> "The question has been answered differently by different courts, and while assuming that there was

an action to recover, the court said (p. 72): 'but where the tax is unauthorized by law we have held that it was the duty of a court of equity to interfere, especially when the recovery of the tax would necessitate a multiplicity of suits.'

* * *

"And in Greedup v. Franklin County, 30 Ark. 101, in referring to a remedy at law by actions to recover back, the court said (p. 110): 'What a multiplicity of suits at law must be brought in order to get redress for an injury which it is proposed to stop in a single suit in equity. We have no means of ascertaining the number of taxpayers in Franklin county, but may suppose they exceed 2,000. Of these perhaps 500 may be able to assert their rights at law, whilst 1,500, who pay less tax, are in moderate circumstances, or too poor to employ counsel to stop the payment of an erroneous tax ten times less than it would cost to employ counsel to prosecute the suit. The mere suggestion of the situation, if left to redress at law, shows that it, in effect, would amount to a denial of redress to offer it to them. In such cases chancery will interfere to prevent multiplicity of suits.

* * *

"A single individual has a legal remedy by taking out a license and suing to recover the money paid for it. Practically it is worthless. He can more cheaply and with less annoyance pay and submit to the exaction than protest and recover. If there were but a few individuals involved equity would leave them to their imperfect legal remedies, and let them go largely unredressed. It is only in combination that they can have effective relief. A representative suit, staying prosecutions until the city's right is determined, does the work. Whether relief should be given in equity is not a question of power or of substantive law, but of right procedure. A court of equity can assume jurisdiction without usurpation. It does the city no wrong. No right to jury

trial is involved. Whether the issue is tried at law or in equity the questions are wholly of law. Indeed, the city might well enough welcome a settlement in one speedy suit. Under our present practice the hearing on appeal from an injunctional order can be had without delay and a speedy result reached. If the suggestion is made that such has not been the result in this case, the answer is that the delay has been because of the controversy over procedure, now settled, never of considerable moment to either party, but important enough, as establishing a precedent, to demand deliberation."

We also quote from note, page 1267:

"By the great weight of authority several taxpayers affected in a similar manner by an illegal tax or license fee may join in a proceeding in equity to restrain the enforcement of the tax and for such other relief as the nature of the case represented may require, provided it is common to all of them" citing King v. Wilson, 1 Dill., 555, Fed. Cas. No. 7,810; Risley v. Utica, 173 Fed. 502, appeal dismissed in 100 C. C. A. 688, 177 Fed. 1005.

Likewise, to support the above quotations, cases are cited from the States of Alabama, Arkansas, Colorado, Illinois, Indiana, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, Georgia, Missouri, New Hampshire, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Texas, Utah, Virginia, and West Virginia.

(b) There is no adequate remedy at law.

The statute authorizing refunds of taxes illegally or unlawfully paid, Section 8270 of Hemingway's Code, only operates on such taxes or moneys as may have been paid into the Treasury of the State. The percentage allowed

the tax collector is retained by him, and never paid into the State. It is a common and universal operation of the Statute that such percentages are never refunded to a taxpayer. For that reason the remedy is inadequate, and for the further reason that, to test the constitutionality of the statute, it would be necessary either for the taxpayer to pay money, part of which he could not recover, or to submit to a criminal prosecution which would seriously interfere with and impair his business. This is not an adequate remedy.

We quote the following from *Shaffer v. Carter*, 252 U. S. 37:

> "Statutes which may furnish an adequate legal remedy against taxes assessed under an unconstitutional law do not bar resort to equity by a taxpayer who avers that the tax lien asserted by virtue of the levy and tax warrant, itself attacked on constitutional grounds, creates a cloud on title, where there appears to be no legal remedy for the removal of a cloud on title cast by an invalid lien imposed for a tax valid in itself."

In *Cable v. United States L. Ins. Co.*, 191 U. S. 288, it is said:

> "The remedy or defense at law which will oust an equity court of jurisdiction must be as complete and as adequate, as sufficient and as final, as the remedy in equity, or else the latter court retains jurisdiction; and it must be a remedy which may be resorted to without impediment created otherwise than by the act of the party, and the remedy of defense must be capable of being asserted without rendering the party asserting it liable to the imposition of heavy penalties or forfeitures, arising other than by reason of its own act."

In *Walla Walla v. Walla Walla Water Company*, 172 U. S. 1, the court said:

> "The remedy at law, in order to exclude a concurrent remedy in equity, must be as complete, as practical, and as efficient to the ends of justice and its prompt administration as the remedy in equity."

There is no adequate legal remedy for the further reason that the sole right for the recovery of the taxes in question by the plaintiffs is that of mandamus in the Circuit Court of Hinds County, Mississippi, against the auditor of the State and the attorney general. This is not an adequate remedy in the eyes of this court for the reason that mandamus is not a suit of a civil nature contemplated by the jurisdictional statutes conferring jurisdiction upon the district courts of the United States.

Southern Ry. Co. v. Query, 21 Fed. (2nd) 333, was a suit in the district court before Parker, a Circuit Judge, and Watkins and Cochran, District Judges, composing the three judge court. It was one to enjoin the collection of income taxes by the State Tax Commission of the State of South Carolina. It was urged that the plaintiff in that case had an adequate remedy at law. We quote the opinion of Judge Cochran dealing with this question:

> "The defendants contend that Act No. 571 of the General Assembly of South Carolina (32 St. at Large, p. 1017), entitled 'An act to authorize and empower the South Carolina tax commission to order an abatement or refund of taxes in certain cases, * * * approved the 22nd day of March, A. D. 1922,' gives the plaintiff a complete and adequate remedy at law. It is provided in that act that, whenever it shall appear to the satisfaction of the South Carolina tax commission that any tax has been paid under an erroneous, improper, or illegal assessment, such commission shall have the power and authority to

order any officer having custody of the taxes so erroneously, improperly, or illegally paid, to refund the same, etc. Section 4 of the same act provides that it shall be in addition to any remedies for the abatement or refund of taxes that may now be provided by law. The Supreme Court of South Carolina, in Bank of Johnston v. Prince, 136 S. C. 439, 134 S. E. 387, held that the remedy was concurrent with other remedies for abatement of taxes and that mandamus would lie to compel the county officers to obey an order of the tax commission directing a refund. The view of the defendants is that, if the plaintiff can show that the tax has been illegally or improperly assessed and the tax commission should refuse to order its refund, it has its remedy at law by mandamus to compel the defendants to issue an order requiring refund. But we do not think that this remedy is adequate. In the first place, it is not available in the federal courts, because it is well settled that the federal courts have no power to issue a writ of mandamus as an original proceeding. Covington & Cincinnati Bridge Co. v. Hager, 203 U. S. 109. In order to prevent a court of equity in the federal courts from assuming jurisdiction in a proper case, the remedy at law must be available in the federal courts, and, where the machinery provided by the act is unknown to the federal courts, the remedy is inadequate. This is illustrated by the decision of the Supreme Court in Chicago, B. & Q. R. Co. v. Osborne, 265 U. S. 14. In that case, the remedy provided was by writ of error issuing from the Supreme Court of the State to the tax body levying the assessment, and it was held that such writ of error could be sued out only from the state Supreme Court and was not available in the federal courts."

(c). Section 304 of Hemingway's Annotated Mississippi Code 1927 (now Section 420, Mississippi Code 1930)

creates new right in equity enforceable in the courts of the United States. We quote the section:

> "304. (290) RESTRAINT OF COLLECTION OF TAXES.—The chancery court shall have jurisdiction of suits by one or more taxpayers in any county, city, town, or village, to restrain the collection of any taxes levied or attempted to be collected without authority of law."

We quote *Pomeroy's Equitable Remedies*, Vol. 1, Section 375:

> "375. INJUNCTION WARRANTED BY STATE LAWS.—Where the federal court acquires jurisdiction of the case and facts are shown which, under the state law, warrant the issuance of an injunction, such relief may be awarded, whether the facts are such as ordinarily warrant such relief in federal courts, or not. Thus, under section 5848 of the Ohio statutes providing that the illegal levy of taxes and assessments, or either, may be enjoined, a federal court may enjoin an increase in the assessment of a national bank, illegal because made by a board of equalization without notice. Under the same statute, the federal court may enjoin the collection of any tax found to be illegal, such, for instance, as a tax on federal bonds which are exempt from taxation. Likewise, where, under the decisions of the supreme court of Kansas an injunction will issue when one class of property is intentionally assessed in greater proportion than another, federal courts, in like cases coming from that state, will grant an injunction. And, following the supreme court of Washington, an injunction will be granted where there has been an unjust discrimination."

In *Cummings v. Merchants' Nat. Bank*, 101 U. S. 153, it is said:

> "But the Statute of the State expressly declares that suits may be brought to enjoin the illegal levy

of taxes and assessments or the collection of them. Section 5848 of the Revised Statutes of Ohio, 1880; Vol. LIII., Laws of Ohio, 178, secs. 1, 2. And though we have repeatedly decided in this court that the statute of a state cannot control the mode of procedure in equity cases in Federal Courts, nor deprive them of their separate equity jurisdiction, we have also held that, where a statute of a State created a new right or provided a new remedy, the Federal Courts will enforce that right either on the common law or equity side of its docket, as the nature of the new right or new remedy requires. Van Norden v. Morton (ante. 453). Here there can be no doubt that the remedy by injunction against an illegal tax, expressly granted by the Statute, is to be enforced, and can only be appropriately enforced in the equity side of the court."

See:

Bunckerhoff v. Broomfield, 94 Fed. 422.
Grether v. Wright, 75 Fed. 742, 23 C. C. A. 498.
Chicago B. & Q. R. Co. v. Board of Commissioners of Republic Co., 67 Fed. 411, 14 C. C. A. 456.
First National Bank v. Hungate, 62 Fed. 548.
Pusey & Jones Co. v. Hanssen, 261 U. S. 491.

In the above case, the Supreme Court was called upon to determine whether or not a Statute of Delaware authorizing a chancellor to appoint a receiver of a corporation on the application of a simple contract creditor should be enforced in the Federal Court. The court reviews all the authorities and concludes that that particular statute was not enforceable. The substance of the decision is (following *Cates v. Allen,* 149 U. S. 451; and *Scott v. Neely,* 140 U. S. 106) that the statute created equitable jurisdiction in a case where equity had not theretofore had jurisdiction. It is held that the statute did not create a substantive equitable right to have a

receiver appointed, and therefore was unenforceable in the Federal Court. The statute gives to a person in Mississippi, from whom taxes are about to be unlawfully extorted, the substantive, absolute, right.

Grether v. Wright, 75 Fed. 742, was a suit to enjoin the collection of taxes, filed in the Circuit Court for a district of Ohio. The sole ground for the injunction was the illegality of the tax, and the fact that the Ohio statute, like the Mississippi statute, had created the remedy. The court was composed of Taft and Lurton, Circuit Judges, and Hammond, District Judge. The opinion was written by Judge Taft. The jurisdiction was attacked on the ground of no equity on the face of the bill. Judge Taft undertook to review all of the authorities. As a predicate for the decision, he quotes the Ohio statute. The material words of the statute are as follows:

> "Courts of common pleas and superior courts shall have jurisdiction to enjoin the illegal levy of taxes and assessments or the collection of either, * * *."

He first points that it was in reliance upon this provision of the statute and three succeeding statutes that the Supreme Court, in *Cummings v. Bank*, grounded its decision in holding that there was equity upon the face of the bill in that case. He quotes extensively from the opinion in that case, and states that, although there were several grounds upon which equitable jurisdiction could have been sustained in *Cummings v. Bank*, nevertheless, it was obvious that the court regarded the statute conferring the remedy by injunction as a sufficient reason for exercising the jurisdiction. He then proceeds to review the cases in which *Cummings v. Bank* had been referred to upon this point with approval by the Supreme Court. Further pursuing the subject, he refers to all

of the cases from the Supreme Court where the principle for which we contend had been applied.

He then proceeds to examine exhaustively the cases of which *Scott v. Neely* and *Cates v. Allen* are examples, where the court denied the jurisdiction, and points out with great clarity that the rationale of all of these cases is that the true reason for the court denying jurisdiction was the fact that the State Statute, in effect, denied the right of trial by jury. He then proceeds to discuss whether or not the state officers, who were parties defendant to that suit, were entitled to the right of trial by jury on the question presented in the injunction case, to-wit: the illegality of the tax. The substance of his conclusions is that the taxpayer is never entitled to the right of trial by jury as to the amount of taxes due by him, referring, for his conclusions, to the line of cases where the Supreme Court has pointed out that the right of taxation by a government is the very essence of its existence, and that this right, without interference from the judicial system, has been and must be exercised in order that the Government may exist. Arriving, therefore, at the conclusion that the taxpayer himself is without the right of trial by jury, he concludes his opinion on this point with the proposition that the state, having denied to the taxpayer the right of trial by jury, places its officers in a position where they cannot insist upon that right. We quote a very small portion of his opinion on this feature of the matter:

> "In other words, this right of a jury trial is one which may be waived, and, where a state makes provision in suits against itself for a remedy, either by injunction or by payment of the money to its officers and a suit for recovery, it must be taken to waive any right which it or its representatives might have to a jury trial, by offering to its taxpayers a remedy

by injunction on the sole ground of illegality. It might be that the state taxing officer sued in assumpsit or for trespass by reason of the receipt of illegal taxes, or the unlawful distraint of property, would have, because of his possible individual liability, a right of jury trial in the courts of the United States under the seventh amendment; but a suit to enjoin his receipt of the money or his distraint of the goods does not interfere with such a right, because it must intervene, if at all, before he can assume any personal liability in regard to the matter. The justiciable issue at the time of the injunction is between the taxpayer on the one hand and the state on the other, represented by its officers; and, unless the state has the right of jury trial, and insists upon it, they cannot complain. * * * In the exercise of this discretion, the state of Ohio has enacted into law chapter 13 of title 1 of division 7 of the Revised Statutes of Ohio as a special mode by which taxpayers may test the legality of a tax, and the easiest and best of the remedies given is that by injunction. Must a court of equity of the United States, sitting in Ohio, say to one asking the benefit of this remedy conceded by the state: 'True, the state may deprive you of a trial by jury if it sees fit in tax litigation with itself, but when the state in such suits of its own gives you the option of a jury trial or an injunction, we must force a jury trial on you?' We think not. Our conclusion, therefore, is that there is no conflict between Cummings v. Bank and the cases of which Scott v. Neely is a type. The case of Cummings v. Bank is still quoted by the Supreme Court of the United States as an authority to sustain the view that a new equitable right secured by statute of the state may be enforced on the equity side of the federal court, provided it does not interfere with the right of trial by jury. The case has never been questioned or dissented from, and even if we were not able to explain a possible conflict between that and some other cases since decided by the supreme court, we should still

not always a necessity to show a common interest or privity between the members of the same class of defendants, the courts have also differed in regard to the jurisdiction of a court of equity in particular cases, even upon such assumption. Numerous cases are cited by Mr. Pomeroy, showing both sides of this question. In any case where the facts bring it within the possible jurisdiction of the court, according to the view taken by it in regard to such facts, the decision must depend largely upon the question of the reasonable convenience of the remedy, its effectiveness, and the inadequacy of the remedy at law."

* * *

"Cases in sufficient number have been cited to show how divergent are the decisions on the question of jurisdiction. It is easy to say it rests upon the prevention of a multiplicity of suits, but to say whether a particular case comes within the principle is sometimes a much more difficult task. Each case, if not brought directly within the principle of some preceding case, must as we think, be decided upon its own merits and upon a survey of the real and substantial convenience of all parties, the adequacy of the legal remedy, the situations of the different parties, the points to be contested and the result which would follow if jurisdiction should be assumed or denied; these various matters being factors to be taken into consideration upon the question of equitable jurisdiction on this ground, and whether within reasonable and fair grounds the suit is calculated to be in truth one which will practically prevent a multiplicity of litigation, and will be an actual convenience to all parties, and will not unreasonably overlook or obstruct the material interests of any. The single fact that a multiplicity of suits may be prevented by this assumption of jurisdiction is not in all cases enough to sustain it. It might be that the exercise of equitable jurisdiction on this ground, while preventing a formal multi-

plicity of suits, would nevertheless be attended with more and deeper inconvenience to the defendants than would be compensated for by the convenience of a single plaintiff; and where the case is not covered by any controlling precedent the inconvenience might constitute good ground for denying jurisdiction."

Fairley v. Duluth, 150 Minn. 374, 185 N. W. 390, 32 A. L. R. 1258, (and extensive note), was a suit by the owner of an automobile seeking to restrain the enforcement of an ordinance of the City of Duluth imposing upon owners of automobiles a wheelage tax. The suit was instituted by one citizen who alleged that he was the owner of an automobile, and that there were approximately 4200 others owning automobiles in said City in like situation for whom the suit was prosecuted. Objection was made that there was no equity on the face of the bill, and that plaintiff had adequate remedy at law. We quote from the opinion:

"Some courts, in determining whether there is jurisdiction in equity, refer to the avoidance of a multiplicity of suits, and the cluttering of the courts with numerous pieces of litigation, involving a single principle, which might be settled in one suit, the principle involved being one in which all similarly situated have a community of interest, though their property interests are distinct and separate.

"The general rule is that the plaintiff, who will not be subjected to numerous suits, cannot state a cause of action in equity based upon the ground that the defendant will be saved a multiplicity of suits. Equitable Life Assur. Soc. v. Brown, 213 U. S. 25. But in determining the propriety of proceeding by injunction courts have referred to the multiplication of litigation as proper for consideration. Thus, in Drainage Comrs. v. Kinney, 233 Ill. 67, 84 N. E. 34, while recognizing that there was a legal remedy by

feel ourselves bound in a case like the present, in which the case of Cummings v. Bank has exact application, to follow it, and to leave to the supreme court the duty of overruling the one or the other of the two conflicting lines of decision."

North Side Canal Co. v. State Board of Equalization, 17 Fed. (2nd) 55 (C. C. A., 8th Circuit), was a suit on behalf of certain parties to enjoin the levying and assessment or collection of a tax on certain lands. The point was made that the court was without equitable jurisdiction because the only ground of equity was the illegality of the tax. We quote from the opinion of the court:

"The only ground for equitable relief stated in the complaints was that the tax levies were illegal and void; and their sufficiency for equitable relief was challenged below and that contention is advanced here. Ordinarily the objection would be good. Shelton v. Platt, 139 U. S. 591; Risty v. Railway Co. (C. C. A.) 297 F. 710. In opposition to this contention appellants rely on section 6302, Wyoming Comp. Stat. 1920, which reads:

"'District courts shall have jurisdiction to enjoin the illegal levy of taxes and assessments, or the collection of either, and of actions to recover back such taxes or assessments as have been collected, without regard to the amount thereof; but no recovery shall be had unless the action be brought within one year after the taxes or assessments are collected.'

"This statute was construed by the Supreme Court of Wyoming in Bunten v. Rock Springs Grazing Ass'n., 29 Wyo. 461, 215 P. 244, and it was said that the section was adopted from Ohio, and under its provisions a plaintiff need not aver and show, in addition to the illegality of the tax, facts bringing the case under some acknowledged head of equity jurisdiction, that it is sufficient to only aver

that the tax is illegal. The Ohio statute was considered by the Supreme Court in Cummings v. Merchants' National Bank, 101 U. S. 153, and the court held that the statute created a new right and provided a new remedy, and that right and remedy would be enforced in the Federal court within the State creating the new right and remedy. The Court of Appeals for the Sixth Circuit has followed the Cummings Case in applying the Ohio statute. Grether v. Wright (C. C. A.) 75 F. 742; Mercantile National Bank v. Hubbard (C. C. A.) 105 F. 809; McKnight v. Dudley (C. C. A.), 148 F. 204. A like statute of Arkansas has been followed by the Federal court sitting in that State; Mudge v. McDougal, (D. C.) 222 F. 562. In Davis v. Gray, 16 Wall. 203, it is said:

> "'A party by going into a national court does not lose any right or appropriate remedy of which he might have availed himself in the State courts of the same locality.'

"And in Dawson v. Kentucky Distilleries & Warehouse Co., 255 U. S. 288, it is said:

> "'And if the equitable remedy was available in the State courts it was not lost by suing in the Federal court.'

"See also Darragh v. H. Watter Mfg. Co. (C. C. A.) 78 F. 7; Brun v. Mann (C. C. A.) 151 F. 145, 12 L. R. A. (N. S.) 154."

In the above case, writ of certiorari was denied by the Supreme Court on April 25th, 1927, in 47 Supreme Court, 586.

In the case of *Dawson v. Kentucky Distilleries & Warehouse Co.*, 255 U. S. 288, referred to in the foregoing case, there was presented the identical question which is here presented, and the point was strenuously urged upon the

court that the illegality of the tax conferred no equity jurisdiction. The court based its decision upon the fact that, although apparently there is no statute in Kentucky as we have in Mississippi, yet there is a long line of decisions of the Supreme Court of Kentucky upholding the right to an injunction in their equity courts by a plaintiff alleging the illegality of the tax. We gather from this case that, although the statute has not created the right, the courts having created the right, it is enforceable in the district court sitting in equity.

Boler v. Calloway, 267 U. S. 479, was a suit filed in the district court of Georgia to enjoin the collection of taxes. The third question determined by the court was the question of whether or not the district court had jurisdiction. It was said that it seemed that the only remedy intended to be furnished in Georgia was by injunction in equity. We quote a short excerpt from the opinion:

> "The case seems to be quite like that of Cummings v. Merchants' National Bank, 101 U. S. 153, in which, under a statute of Ohio authorizing a suit for injunction to prevent the collection of illegal taxes, it was held that a bill would lie in the federal court to enjoin the collection of a tax as illegal because it discriminated against the shares of a national bank."

THE MERITS

Under the admitted facts disclosed by the record, this case is brought squarely within the ruling in,

William Lemke vs. Farmers Grain Co., 258 U. S. 50;
Shafer vs. Farmers Grain Co., 268 U. S. 189;
Eureka Pipe Line Co. vs. Hallanan, 257 U. S. 265;
United Fuel Gas Co. vs. Hallanan, 257 U. S. 277;

Dahnke-Walker Milling Co. vs. C. T. Bondurant, 257 U. S. 282;
Ware & Leland vs. Mobile County, 209 U. S. 405;
Ozark Pipe Line Corp. vs. Monier, et. al., 266 U. S. 555;
Burton, et. al. vs. Clyne, etc., 258 U. S. 495;
Federal Trade Commission vs. Pacific States Paper Trade Association, 273 U. S. 52;
Foster Fountain Packing Co. Inc. vs. Haydel, 278 U. S. 1;
Leloup vs. Mobile, 127 U. S. 640;
Sprout vs. City of South Bend, 277 U. S. 163;
Helson vs. Commonwealth of Kentucky, 279 U. S. 245;
Binderup vs. Pathe Exchange, Inc., 263 U. S. 291;
United States of America vs. Erie Railroad Co., 280 U. S. 98;
New Jersey Bell Telephone Co. vs. State Board of Taxes, etc., 280 U. S. 338;
Carson Petroleum Co. vs. Vial, 279 U. S. 95;
Cudahay Packing Co. vs. Hinkle, 278 U. S. 460;
Bowman vs. Continental Oil Co., 256 U. S. 642.

The facts of the *Lemke case*, supra, and *Shafer case*, supra, and the conclusions reached by the Court are so clearly in conformity with the contention of appellees in this case, we take the liberty of quoting *in extenso* from the opinions in those causes.

The facts and conclusions of the Court in the *Lemke case*, through Mr. Justice Day, so far as pertinent to the case at bar, are as follows:

> "The record discloses that North Dakota is a great grain growing State, producing annually large crops, particularly wheat, for transportation beyond its borders. Complainant and other buyers of like character, are owners of elevators and purchasers of grain bought in North Dakota, to be shipped to and sold at terminal markets in other States, the prin-

cipal markets being at Minneapolis and Duluth. There is practically no market in North Dakota for the grain purchased by complainant. The Minneapolis prices are received at the elevators of the complainant from Minneapolis four times daily, and are posted for the information of those interested. To these figures the buyer adds the freight and his "spread," or margin of profit. The purchases are generally made with the intention of shipping the grain to Minneapolis. The grain is placed in the elevator for shipment, and loaded at once upon cars for shipment to Minneapolis and elsewhere outside the State of North Dakota. The producers know the basis upon which the grain is bought, but whoever pays the highest price gets the grain,—Minneapolis, Duluth, or elsewhere. This method of purchasing, shipment, and sale is the general and usual course of business in the grain trade at the elevator of complainant and others similarly situated. The market for grain bought at Emden is outside the State of North Dakota, and it is an unusual thing to get an offer from a point within the State. After the grain is loaded upon the cars it is generally consigned to a commission merchant at Minneapolis. At the terminal market the grain is inspected and graded by inspectors licensed under Federal Law.

"That such course of dealing constitutes interstate commerce, there can be no question. This Court has so held in many cases, and we have had occasion to discuss and decide the nature of such commerce in a case closely analogous in its facts, and altogether so in principle. *Dahnke-Walker Mill Co. v. Bondurant*, decided December 12, 1921 (257 U. S. 282, ante, 239, 42 Sup. Ct. Rep. 106). In that case the facts disclose that a company organized in Tennessee, and carrying on business there, went into Kentucky, and, through an agent there, bought wheat for shipment to the company's mill in Tennessee. The State Court held that the transaction was merely a purchase of wheat in Kentucky, and made the

Tennessee company amenable to the regulatory statutes of the State. This Court rejected the conclusion of the State Court, and held that the buying, no less than the selling of grain, under such circumstances, was a part of interstate commerce, committed to a national control by the Federal Constitution. Applying the principle of that decision, and the previous decisions of this court, cited in the opinion, the complainant's course of dealing in the buying of grain, which it purchased and sold under the circumstances herein disclosed, was interstate commerce. Being such, the state could not regulate the business by a statute which had the effect to control and burden interstate commerce.

"Nor is this conclusion opposed by cases decided in this Court and relied upon by appellants, in which we have had occasion to define the line between State and Federal authority under facts presented, which required a definition of interstate commerce where the right of State taxation was involved, or manufacture or commerce of an intrastate character was the subject of consideration. In those cases we have defined the beginning of interstate commerce as that time when goods begin their interstate journey by delivery to a carrier or otherwise, thus passing beyond state authority into the domain of Federal control. Cases of that type are not in conflict with principles recognized as controlling here. None of them indicates, much less decides, that interstate commerce does not include the buying and selling of products for shipment beyond state lines. It is true, that appellants contend, that after the wheat was delivered at complainant's elevator, or loaded on the cars for shipment, it might have been diverted to a local market or sent to a local mill. But such was not the course of business. The testimony shows that practically all of the wheat purchased by the complainant was for shipment to and sale in the Minneapolis market. That was the course of business, and fixed and determined the inter-

state character of the transaction. . . . (Citing authorities.)

"It is contended that these regulations may stand upon the principles recognized in decisions of this Court which permit the State to make local laws under its police power, in the interest of the welfare of its people, which are valid, although affecting interstate commerce, and may stand, at least until Congress takes possession of the field under its superior authority to regulate commerce among the States. This principle has no application where the State passes beyond the exercise of its legitimate authority, and undertakes to regulate interstate commerce by imposing burdens upon it. This Court stated the principle and its limitations in the discussion of the subject in the Minnesota Rate Case (Simpson v. Shepard), 230 U. S. 352, 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151, 33 Sup. Ct. Rep. 729, Ann. Cas. 1916A, 18. In the course of the opinion in that case, we said (p. 400):

> " 'The principle which determines this classification (between Federal and State power) underlies the doctrine that the states cannot, under any guise, impose direct burdens upon interstate commerce. For this is but to hold that the states are not permitted directly to regulate or restrain that which, from its nature, should be under the control of the one authority and be free from restriction, save as it is governed in the manner that the natural legislature constitutionally ordains.'

"Thus, the States cannot tax interstate commerce, either by laying the tax upon the business which constitutes such commerce or the privilege of engaging in it, or upon the receipts, as such, derived from it. . . . (Citing authorities.)"

"Applying the principle here, the statute denies the privilege of engaging in interstate commerce,

except to dealers licensed by state authorities, and provides a system, which enables state officials to fix the profit which may be made in dealing with a subject of interstate commerce."

After the decision in the above cause, the State of North Dakota undertook once again to regulate the purchase of grain within North Dakota. This act was challenged and in the *Shafer case*, supra, in delivering the opinion of the Court, Mr. Justice Van DeVanter stated:

"A prior statute concededly 'having the same purpose' was adopted by the state legislature in 1919, and held invalid by this Court in *Lemke v. Farmers Grain Co.*, 258 U. S. 50, 66 L. Ed. 458, 42 Sup. Ct. Rep. 244, as an interference with interstate commerce. There are differences between that statute and the present one, of which the parties take divergent views. It would serve no purpose to take up these differences in detail. We shall describe the situation to which the present act is intended to apply, state its material provisions, and then come to its operation on interstate commerce.

"Wheat is the chief product of the farms of North Dakota, the annual crop approximating 150,000,000 bushels. About 10 per cent is used and consumed locally, and about 90 per cent is sold within the state to buyers who purchase for shipment, and ship to terminal markets outside the state. Most of the sales are made at country elevators to which the farmers haul the grain when harvested and threshed. These elevators are maintained and operated by the buyers as facilities for receiving the grain from farmers' wagons and loading it into railroad cars. The loading usually proceeds as rapidly as grain of any grade is accumulated in carload lots and cars can be obtained. When a car is loaded, it is sent promptly to a terminal market and the grain is there sold. This is the usual and recognized course of buying and shipment. Occasionally a farmer has his

grain stored in the country elevator, or shipped to a terminal elevator for storage, and awaits a possible increase in price; but even in such instances he usually sells to the buyer operating the country elevator, and the latter then sends the grain to the terminal market, if it has not already gone there.

"The price paid at the country elevators rises and falls with the price at the terminal markets, but is sufficiently below the latter to enable the country buyer to pay for the intermediate transportation and have a margin of profit. All transactions at the terminal markets, including the price, are based on the grade of the wheat, and by reason of this all buying at the country elevators is by grade.

"The grading at the terminal markets is done by inspectors licensed under the United States Grain Standards Act, who are required to apply to all interstate shipments the grading standards promulgated under that act by the Secretary of Agriculture. There are no inspectors licensed under that act at the country elevators; and so the grading is done there unofficially by the buyers or their agents as an incident and part of the buying.

"Grading includes an ascertainment of the proportions of clean wheat and of dockage in each lot of grain, and an ascertainment of the quality of the wheat. Dockage consists of separable foreign material, such as dirt, pieces of straw, chaff, weed stems, weed seeds, and grain other than wheat. Its proportion varies in different lots, but generally is less than 5 per cent. When not separated it causes the grain to bring a lower price per bushel than clean wheat would bring. When separated it has a value for poultry and stock feed which usually is in excess of the cost of separation. Occasionally the farmer separates it at the farm and sells only the clean wheat, and occasionally the buyer separates it at the country elevator, charges the farmer for that

service, and buys and ships only the clean wheat; but generally the grain is sold by the farmer and shipped by the country buyer with the dockage included. The influence of dockage on the value of the grain and the current modes of handling it are shown in publications of the Agricultural Department of the United States, pertinent excerpts from which are set out in the margin.

"As many as 2,200 country elevators are operated within the state in the business here described,—generally two or more by competing buyers at each station. Some of the buyers are individuals and others are corporations. A large number are farmers' co-operative companies, which buy grain grown by their stockholders and others in the vicinity of their elevators, ship and sell the same, and distribute as patronage dividends the surplus arising from such transactions—no profit being retained by the companies.

"The plaintiffs compromise, many buyers, individual and corporate, including eleven farmers' co-operative companies. In the aggregate they own and operate several hundred country elevators, widely distributed over the state, and buy and ship about 30,000,000 bushels of wheat per year. They carry on the business severally, each buying and shipping independently of the others. All buy with the purpose of shipping to and selling in terminal markets outside the state, and carry out this purpose in the manner already described."

The Court, after setting out the above facts, stated:

"Buying for shipment and shipping to markets in other states, when conducted as above shown, constitutes interstate commerce,—the buying being as much a part of it as the shipping. We so held in *Lemke v. Farmers Grain Co.*, 258 U. S. 50, 66 L. Ed. 458, 42 Sup. Ct. Rep. 244; following and applying the principle or prior cases. Later cases have given

effect to the same principle. *Stafford v. Wallace*, 258 U. S. 495, 516, 66 L. Ed. 735, 741, 23 A. L. R. 229, 42 Sup. Rep. 397; *Binderup v. Pathe Exchange*, 263 U. S. 291, 309, 68 L. Ed. 308, 316, 44 Sup. Ct. Rep. 96. Wheat—both with and without dockage—is a legitimate article of commerce and a subject of dealings that are nation wide. The right to buy it for shipment, and to ship it, in interstate commerce, is not a privilege derived from state laws, and which they may fetter with conditions, but is a common right, the regulation of which is committed to Congress and denied to the states by the commerce clause of the Constitution."

The Court likewise stated:

"We think it plain that, in subjecting the buying for interstate shipment to the conditions and measure of control just shown, the act directly interferes with and burdens interstate commerce, and is an attempt by the state to prescribe rules under which an important part of such commerce shall be conducted. This no state can do consistently with the commerce clause."

In the case at bar, it is conceded that all of the cotton purchased by appellees is actually shipped to points without the State of Mississippi and, therefore, it would be impossible to entertain any intention other than that this course would be followed and was so intended at the time of the purchase, even though certain "Overs" should have been disposed of locally by appellees to other Cotton Buyers. The latter bales of cotton likewise were intended ultimately to be shipped to foreign states and countries.

The *Dahnke-Walker Milling Co. case*, supra, approved in the *Lemke case*, supra, states the rule as follows:

"Such commerce (commerce among the several states) is not confined to transportation from one

state to another, but comprehends all commercial intercourse between different states and all the component parts of that intercourse. Where goods in one state are transported into another state for purposes of sale, the commerce does not end with the transportation, but embraces as well the sale of the goods after they have reached their destination, and while they are in the original packages . . . (citing authorities) . . . On the same principle, where goods are purchased in one state for transportation to another, the commerce includes the purchase quite as much as it does the transportation. . . ." . . ."Buying and selling and the transportation incidental thereto constitute commerce." . . . "Interstate commerce consists of intercourse and traffic between the citizens or inhabitants of different states and includes not only the transportation of persons and property and the navigation of public waters for that purpose, but also the purchase, sale and exchange of commodities. In no case has the Court made any distinction between buying and selling or between buying for transportation to another state and transporting for sale in another state.

"A corporation of one state may go into another without obtaining leave or license of the latter, for all legitimate purposes of such commerce and any statute of the latter state, which obstructs or lays a burden on the exercise of this privilege is void under the commerce clause."

In *Ozark Pipe Line Corporation vs. Monier*, supra, the Court stated:

"The tax is one upon the privilege or right to do business. . . .; and if appellant is engaged only in interstate commerce, it is conceded, as it must be, that the tax so far as appellant is concerned, constitutionally cannot be imposed. It long has been settled that a state cannot lay a tax on interstate commerce in any form—whether on the transporta-

of the City of South Bend, imposing a privilege tax, unconstitutional, the Court stated:

"By ordinance adopted in 1921, South Bend, Indiana, prohibited with exceptions not here material, the operation on its street of any motor bus for hire unless licensed by the city. Sprout, a resident of that state, operated regularly a bus with seats for twelve persons between points within South Bend and the city of Niles, Michigan. He paid the state registration fee but refused to apply for a city license. In 1923, he was prosecuted by the city in a local court for violation of the ordinance and defended on the ground that it was invalid as applied to him. The case was heard on agreed facts. Sprout claimed, among other things, that the ordinance violated the commerce clause and the equal protection clause of the 14th Amendment.

"The ordinance describes license fees varying with the seating capacity of the bus. That for a bus with seats for twelve persons is $50.00 a year.

"The requiremetns apply alike to busses operating wholly within the city and to those operating from points within it to points without. The ordinance makes no distinction between busses engaged exclusively in interstate commerce, those engaged exclusively in intrastate commerce, and those engaged in both classes of commerce.

"The claim that the ordinance violates the commerce clause presents questions requiring serious consideration. Sprout did not carry passengers from one point in South Bend to another. He was not a local carrier. Primarily his business was interstate. But the agreed facts show that he was not engaged exclusively in interstate commerce. The distance from the north city limits of South Bend to Niles is about nine miles. Half of this distance lies within Indiana along the highway traversed within

that state lie many suburban residences and one village tributory to South Bend. Sprout purported to offer transportation from that city only to persons destined to points in Michigan. He required that all passengers from South Bend pay the fare to some Michigan point. But, in fact, he served suburban passengers. He made stops habitually at points within Indiana, in order to permit passengers from South Bend to leave the bus before the state-line was reached. The legal character of this suburban bus traffic was not affected by the device of requiring the payment of a fare fixed for some Michigan point or by Sprout's professing that he sought only passengers destined to that state. The actual facts govern. For this purpose, the destination intended by the passenger when he begins his journey and known to the carrier, determines the character of the commerce. Compare *Philadelphia R. R. Co. v. Hancock,* 253 U. S. 284, 64 L. Ed. 907, 40 Sup. Ct. Rep. 512; *Baltimore & O. S. W. R. Co. v. Settle,* 260 U. S. 166, 171, 67 L. Ed. 189, 192, 43 Sup. Ct. Rep. 28. The suburban traffic was intrastate commerce.

"But it does not appear that the license fee here in question was imposed as an incident of such a scheme of municipal regulation; nor that the proceeds were applied to defraying the expenses of such regulation; nor that the amount collected under the ordinance was no more than was reasonably required for such a purpose. It follows that the exaction of the license fee cannot be sustained as a police measure. . . . (Citing authorities.). . .

"It follows that on the record before us the exaction of the license fee cannot be sustained either as an inspection fee or as an excise for the use of the streets of the city. It remains to consider whether it can be sustained as an occupation tax. A state may, by appropriate legislation, require payment of an occupation tax from one engaged in both intrastate and interstate commerce. . . . (Citing authori-

> ties). . . . And it may delegate a part of that power to a municipality. Compare *Postal-Teleg. Cable Co. v. Richmond,* 249 U. S. 252, 257, 63 L. Ed. 590, 593, 39 Sup. Ct. Rep. 265. But in order that the fee or tax shall be valid, it must appear that it is imposed solely on account of the intrastate business; that the amount exacted is not increased because of the interstate business done; that one engaged exclusively in interstate commerce would not be subject to the imposition; and that the person taxed could discontinue the intrastate business without withdrawing also from the interstate business. . . . A state is equally inhibited from conditioning its exercise on the payment of an occupation tax."

In *Leloup vs. Mobile,* 127 U. S. 640, which latter case has been cited and affirmed, followed and approved in numerous instances, by this Court the rule is laid down, as follows:

> "No state has a right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, and the reason is that such taxation is a burden on that commerce and amounts to a regulation of it, which belongs solely to Congress."

This principle was squarely presented to the Court in the *Bowman* case, supra, wherein it appeared that 95.5 per cent of the business transacted by the Oil Company in that cause was strictly intrastate and 5.5 per cent interstate, and the Court held specifically that inasmuch as the statute was inseparable and equally applicable to interstate as well as intrastate commerce, it could not be upheld. In delivering the opinion of the Court, Mr. Justice Pitney stated:

> "But with the license tax it is otherwise. If the

statute is inseparable, then both by its terms and by its legal operation and effect this tax is imposed generally upon the entire business conducted, including interstate commerce as well as domestic; and the tax is void under the authority of *Leloup v. Mobile,* 127 U. S. 640, 647, 32 L. Ed. 311, 314, Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380; *Crutcher v. Kentucky,* 141 U. S. 47, 58, 59, 35 L. Ed. 649, 652, 653, 11 Sup. Ct. Rep. 851; *Williams v. Talladega,* 226 U. S. 404, 419, 57 L. Ed. 275, 281, 33 Sup. Ct. Rep. 116; and other cases of that character.

Upon the question of severability, we are constrained to concur in the view adopted by the district court; and this notwithstanding our hesitation, in advance of a declaration by the court of last resort of the state, to adopt a construction bringing the law into conflict with the Federal Constitution. *Ohio Tax Cases,* 232 U. S. 576, 58 L. Ed. 738, 745, 34 Sup. Ct. Rep. 372; *St. Louis Southwestern R. Co. v. Arkansas,* 235 U. S. 350, 369, 370, 59 L. Ed. 265, 274, 275, 35 Sup. Ct. Rep. 99. The act, in its 2d section, requires every distributor of gasoline to pay an annual license tax of $50 for each distributing station or place of business or agency; requires it to be paid in advance; and renders it unlawful to carry on the business without having paid it. Section 8 declares that any person who shall engage or continue in the business of selling gasoline without a license shall be deemed guilty of a misdemeanor, and, upon conviction, be punished by fine or imprisonment, or both. The subject taxed is not in its nature divisible, as in the case of the excise tax. The imposition falls upon the entire business indiscriminately; and so does the prohibition against the further conduct of business without making the payment. By accepted canons of construction, the provisions of the act in respect to this tax are not capable of separation so as to confine them to domestic trade, leaving interstate commerce exempt.... (Citing authorities.)

> No doubt the state might impose a license tax upon the distribution and sale of gasoline in domestic commerce if it did not make its payment a condition of carrying on interstate or foreign commerce. But the state has not done this by any act of legislation. Its executive and administrative officials have disavowed a purpose to exact payment of the license tax for the privilege of carrying on interstate commerce. But the difficulty is that, since plaintiff, so far as appears, necessarily conducts its interstate and domestic commerce in gasoline indiscriminately at the same stations and by the same agencies, the license tax cannot be enforced at all without interfering with interstate commerce unless it be enforced otherwise than as prescribed by the statute, —that is to say, without authority of law. Hence, it cannot be enforced at all."

Whereas we concede that the State of Mississippi has the right of taxation of property having a *situs* in the State, yet a tax cannot be levied for the privilege of transacting such commerce.

In *Helson vs. Commonwealth of Kentucky,* supra, the court held:

> "While a state has power to tax property having a *situs* within its limits, whether employed in interstate commerce or not, it cannot interfere with interstate commerce through the imposition of a tax, which is in effect, a tax for the privilege of transacting such commerce."

To the same effect is the case of *New Jersey Bell Telephone Co. v. State Board of Taxes,* supra, wherein the Court stated:

> "It is elementary that a state may tax property used to carry on interstate commerce. But, as the Constitution vests exclusively in the Congress power to regulate interstate and foreign commerce, a state

may not tax, burden or interfere with such commerce or tax as such gross earnings derived therefrom or impose a license or other burden upon the occupation or the privilege of carrying on such commerce, whatever may be the instrumentalities or means employed to that end."

The mere fact that the cotton, the subject matter of the sale, purchase and shipment by appellees, herein, is interrupted in transit and stored in warehouses pending the accumulation thereof for the purpose of sale and shipment to foreign markets, does not render the character of the business of appellees any the less interstate.

Binderup vs. Pathe Exchange, Inc., 263 U. S. 291.

In the *Binderup* case, supra, *Stafford vs. Wallace*, 258 U. S. 495, was approved in the following language:

"The most recent expression of this court is in *Stafford v. Wallace*, 258 U. S. 495, 516, 66 L. Ed. 735, 741, 23 A. L. R. 229, 42 Sup. Ct. Rep. 397, where, after describing the process by which live stock are transported to the stock yards and thence to the purchasers, it is said: 'Such transactions cannot be separated from the movement to which they contribute, and necessarily take on its character. The commission men are essential in making the sale, without which the flow of the current would be obstructed, and this, whether they are made to packers or dealers. The dealers are essential to the sales to the stock farmers and feeders. The sales are not, in this aspect, merely local transactions. They create a local change of title, it is true, but they do not stop the flow; they merely change the private interests in the subject of the current, not interfering with, but, on the contrary, being indispensable to, its continuity.' The transactions here are essentially the same as those involved in the foregoing cases, substituting the word, 'film' for

the words 'live stock,' or 'cattle,' or 'meat.' Whatever difference exists is of degree and not of character."

In the case at bar, the transactions of appellees are essentially the same as those involved in the *Binderup* case, supra, and as stated in that case, "transactions here are essentially the same as those involved in the foregoing cases, substituting the word 'film' for the words 'live stock,' or 'cattle,' or 'meat,' " and we might add the word "cotton."

The Attorney General apparently concedes that the facts in *Lemke vs. Farmers Grain Co.*, supra, are substantially identical with the facts in the case at bar, "except grain was handled in the former and cotton in the latter."

(Brief on behalf of Appellants, Page 33.)

However, it is undertaken to differentiate the holding in the *Lemke* case, from the contentions made in the instant case, on the ground that a statute of North Dakota involved in that case, "undertook to tax the selling price of grain purchased in North Dakota, even though such grain was sold in another state and in interstate commerce."

We submit, however, that the course of business of the buyers of grain in North Dakota, in purchasing the said grain for shipment into Minneapolis and other markets, constituted an integral part of interstate commerce. And this being true, the State of North Dakota was without authority to impose a privilege or license tax against the buyers of grain under the conditions stated in the opinion of the Court. The essential holding in that case was that such course of business constituted a part of interstate

commerce and, therefore, the nature or extent of the burden undertaken to be imposed is immaterial inasmuch as such attempted imposition would be in violation of the commerce clause of the Constitution.

In respect to the proposition, however, advanced by the Attorney General representing the Appellants, the *Shafer* case, supra, involving a similar statute of North Dakota, enacted after the decision of the *Lemke* case, wholly disposes of this contention, inasmuch as the Court in the *Shafer* case held the act itself unconstitutional and void.

Since it is conceded that the admitted facts of the case at bar are practically identical with the facts in the *Lemke* and *Shafer* cases, supra; admitted both in the brief filed on behalf of Appellants and in the Stipulation of Evidence, it is submitted that the learned Three Judge Court, convened to hear this cause on the application for preliminary injunction and likewise on its merits, was correct in its holding, as reflected by the finding of facts and correct in determining *Section 56, Chapter 88 of the Laws of 1930 of the State of Mississippi,* to be unconstitutional and void, insofar as appellees may be affected thereby, and were eminently correct in perpetually enjoining the Officers of the State of Mississippi from enforcing the act.

Our attention has not been called to any case from this Court contrary to the cases cited in support of the merits. All of the cases relied upon by the appellants deal with matters wholly disassociated from interstate commerce or taxation of interstate commerce, but deal with property having a definite *situs* within the sovereignty undertaking to levy a tax and not with an occupation

essential and necessary in the advancement of interstate commerce.

It is, therefore, respectfully submitted that this cause should be affirmed.

Respectfully submitted,

EDWARD W. SMITH,

SAM C. COOK,

J. L. ROBERSON,

Attorneys for Appellees.

J. W. CUTRER,

Of counsel for Appellees.

CERTIFICATE

This is to certify that I have received a true copy of the above and foregoing brief.

This the 12th day of November, A. D., 1931.

Geo. T. Mitchell,

Attorney General,

By J. A. Lauderdale,

Assistant Attorney General,

Attorneys for Appellants.

APPENDIX

Excerpts From Chapter 88, Laws 1930.

SEC. 56. COTTON BUYERS.—Every person engaged in the business of buying or selling cotton for himself shall pay a privilege tax of one hundred ($100.00) dollars; but, where a cotton buyer from one gin in only one county or buys from the producers in only one municipality, said privilege tax is twenty-five ($25.00) dollars; the license must be issued in his name, and may be paid on or before the first day of September for a full year; only the municipality of his residence can collect a municipal privilege tax of him. Every individual, firm, partnership or corporation engaged in the business of buying or selling cotton shall take out in his or their name a state privilege tax of twenty-five ($25.00) dollars for every employee engaged in their business as buyer or seller, on or before the first day of September; such privilege tax shall authorize the buying or selling cotton by its bearer; and it shall be unlawful for any employee to buy or sell cotton without a privilege tax in his possession, issued in the name of his employer. Such license cannot be issued for less than a year.

If the individual, firm, partnership, or corporation take out a municipal privilege in his or their name for the municipality of the residence of their employee and take out also, the state privilege tax imposed on them above, such employee shall have the authority to buy or sell cotton in any other municipality of the State, without paying any further state or municipal privilege tax.

But the privilege taxes shall not be required of any landlord or other person who received cotton in payment

tion of subjects of commerce, [redacted] receipts derived therefrom, or the occupation of [redacted] ness of carrying it on. . . The state has no such power even in the case of domestic corporations. . . . The statute, as applied to appellant is unconstitutional."

Another case peculiarly analogous to the case at bar is the *Federal Trade Commission* case, supra, wherein the Court stated, as follows:

"Paragraph (c) applies only to mill shipments from one state to another. For the consummation of a transaction involving such a shipment, two contracts are made. The first is for sale and delivery by wholesaler to retailer in the same state. The seller is free to have delivery made from any source within or without the state. The price charged is that fixed by the local association. The other contract is between the wholesaler and manufacturer in different states. There is no contractual relation between the manufacturer and retailer. By the shipment of the paper from a mill outside the state to or for the retailer, the wholesaler's part of the first contract is performed. The question is whether the sale by the wholesaler to the retailer in the same state, is a part of interstate commerce where, subsequently at the instance of a seller and to perform his part of the contracts, the paper is shipped from a mill in another state to or for the retailer. 'Commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business.' *Swift & Co. v. United States*, 196 U. S. 375, 398, 49 L. Ed. 518, 525, 25 Sup. Ct. Rep. 276. And what is or is not interstate commerce is to be determined upon a broad consideration of the substance of the whole transaction. *Dozier v. Alabama*, 218 U. S. 124, 128, 54 L. Ed. 965, 967, 28 L. R. A. (N. S.) 264, 30 Sup. Ct. Rep. 649. Such commerce is not confined to transportation, but comprehends all commercial intercourse between different states and all the component parts of that intercourse. And

it includes the buying and selling of commodities for shipment from one state to another. *Dahnke-Walker Mill Co. vs. Bondurant*, 257 U. S. 282, 290, 66 L. Ed. 239, 243, 42 Sup. Ct. Rep. 106; *Lemke v. Farmers' Grain Company*, 258 U. S. 50, 55, 66 L. Ed. 458, 462, 42 Sup. Ct. Rep. 244. The absence of contractual relation between the manufacturer and retailer does not matter. The sale by the wholesaler to the retailer is the initial step in the business completed by the interstate transportation and delivery of the paper. Presumably the seller has then determined whether his source of supply is a mill within or one without the state. If the contract of sale provided for shipment to the purchaser from a mill outside the state, then undoubtedly it would be an essential part of commerce among the states. *Sonneborn Bros. v. Cureton (Sonneborn Bros. v. Keeling)*, 262 U. S. 506, 515, 67 L. Ed. 1095, 1100, 43 Sup. Ct. Rep. 643. Clearly the absence of such a provision does not affect the substance of the matter when in fact such a shipment was contemplated and made. . . . (Citing authorities) The election of the seller to have the shipment made from a mill outside the state makes the transaction one in commerce among the states. And on these facts the sale by jobber to retailer is a part of that commerce."

Even were we to concede, which we do not, that appellees, as an incident of their interstate business, transact a small and inconsequential intrastate business, nevertheless the privilege tax cannot be upheld, for the reason that it does not appear from the statute that the tax is imposed solely on account of the intrastate business. It, therefore, follows that the tax is inapplicable and void, as placing a burden on interstate commerce.

In *Otis Sprout vs. City of South Bend*, supra, a question identical with the question here presented was brought to the attention of this Court, and in declaring an ordinance

of accounts due him, nor of any merchant who pays a privilege tax on a store and who purchases only from the producer at the place of business of such merchant, nor to cotton mills domiciled in Mississippi where the cotton is purchased for manufacturing purposes.

SEC. 220. TAXPAYER TO APPLY FOR LICENSE. —Every person required to obtain a license for the privilege of engaging in any business for which a privilege tax is required shall make application therefor in writing to the officer who is required to collect the tax; which application shall be made on the form prescribed by the State Auditor of Public Accounts, except as otherwise provided by law, and which shall contain all the information necessary for the officer collecting the tax to properly classify the applicant or to ascertain the amount of tax due. The application shall be sworn to by the taxpayer, or any officer or duly authorized agent of the said taxpayer, which oath may be administered by any officer required by law to collect a privilege tax. The application shall be accompanied by the amount of the privilege tax required by law. Any person who shall wilfully make any false statement in an application for a privilege license shall be guilty of a misdemeanor, and on conviction thereof shall be required to pay as damage double the amount of the difference between the tax paid and that which should have been paid, in addition to the fine and/or imprisonment imposed. The officer taking the application for privilege license shall carefully preserve the same for the use of the grand jury, the courts of the state and/or any duly authorized officer of the State of Mississippi. And any officer who shall refuse or wilfully fail to take or require the application or af-

fidavit herein required shall be guilty of a misdemeanor and subject to the penalties therefor.

SEC. 221. LICENSE TO BE ISSUED.—Upon the receipt of the application herein required and payment of the amount shown thereby to be due for the privilege tax, the officer to whom said application is made shall issue to the applicant taxpayer a privilege license according to such application, and shall date the same as of the first day of the month of its issuance, and such license shall be good, usable and valid for one year after the date thereof, or for such other period as is fixed by law for the privilege and designated in the license. The officer issuing the license shall countersign the same when issued by him, and he shall enter the same in the register prescribed by law therefor. The license issued by collectors as herein provided shall be executed in triplicate, the original shall by the officer be delivered to the licensee, the duplicate forwarded to the State Tax Commission, and the triplicate attached to the application therefor, and preserved by the officer as a public record. If, however, such officer shall before issuing the said license, or at any time thereafter, have reason to believe that the statements of the business contained in the application are incorrect or false in any material particular, the said officer shall notify the applicant by mail wherein the supposed discrepancy lies, and he hereby is empowered to require the applicant to render such other information as will enable him to determine the proper tax due. After making such determination of the proper tax due such officer shall forthwith proceed to collect the same before any license be issued; and if the license shall have been issued under the original application he shall collect the difference between the sum shown to be properly due and the sum paid with the original ap-

plication and issue an additional license therefor which shall expire at the same time as the original. If the additional tax be paid within thirty days after the determination by the officer of the amount due no penalty shall be applied. If the taxpayer shall wilfully fail or refuse to furnish the information requested by such officer he shall be liable for damages as in other cases of payment of an insufficient privilege tax, and may be proceeded against civilly or criminally as otherwise provided herein, and shall suffer the penalties provided herein therefor.

SEC. 225. DAMAGES AND PENALTY FOR FAILURE TO PROCURE LICENSE.—All persons liable for privilege taxes who shall fail to procure the license therefor before beginning the business for which a privilege tax is required by law, or who shall fail to renew, during the month in which it is due, the license on a business for which he has theretofore procured a privilege license, shall in each or either such instance be liable for double the amount of the tax required for such business, and it is hereby made the duty of the collector whose duty it is to collect the tax on such business to collect the said tax penalty, and to endorse across the face of the license issued as a penalty the words: "Collected as Damages"; and they shall account for all such penalties, less commissions, as they are required to account for other privilege taxes. In addition to the hereinabove described penalties the delinquent taxpayer shall be guilty of a misdemeanor and subject to the penalties therefor.

SEC. 240. OFFICER LIABLE FOR TAXES WHICH HE MIGHT BUT FAILS TO COLLECT.—The tax officer required to collect privilege taxes shall require all persons liable to pay a privilege tax to pay

the same; and he shall cause all persons doing business without a privilege license to be prosecuted. The tax officer required to collect privilege taxes shall be liable for wilful failure to collect the same in the same manner as for failure to collect ad valorem taxes, and the liability of such officer shall extend to all cases where he might collect such taxes but negligently fails to do so. The demand required by this section shall not be necessary to render liable the taxpayer to the penalty of doing business without first paying the tax.

SEC. 242. PENALTIES.—Any person violating any of the provisions of this chapter shall be guilty of a misdemeanor and on conviction thereof shall be fined not more than $500.00 or imprisoned in the county jail not exceeding six months, or by both such fine and imprisonment in the discretion of the court within the limitations aforesaid; and such fine and imprisonment shall be in addition to any other penalty imposed by any particular section of this chapter (act). The courts of the county in which the offender resides, or if a company, in which it carries on business, shall have jurisdiction to enforce this section.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1931

No. 84

W. L. MATTHEWS, ET. AL., APPELLANTS

VS.

J. F. RODGERS, ET. AL., APPELLEES

CERTIFICATE

This is to certify that I have received a true copy of the above and foregoing brief.

This the 12th day of November, A. D. 1931.

GEO. T. MITCHELL,
Attorney General.

J. A. LAUDERDALE,
Assistant Attorney General.
Attorneys for Appellants.

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CERTIFICATE OF COUNSEL

This is to certify that the undersigned has this day mailed postpaid to Geo. T. Mitchell, Attorney General, and J. A. Lauderdale, Assistant Attorney General, Attorneys for the appellants, in the above and foregoing cause, a true copy of the Brief proposed to be filed herein on behalf of the appellees.

Witness the signature of the undersigned on this the 11th day of November, A. D., 1931.

EDWARD W. SMITH,
Of Counsel for Appellees.

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Appellees

SUPPLEMENTAL BRIEF FOR APPELLEES ON RE-ARGUMENT

J. W. CUTRER,
Of Counsel for Appellees.

EDWARD W. SMITH,
SAM C. COOK,
J. L. ROBERSON,
Attorneys for Appellees.

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SUPPLEMENTAL BRIEF FOR APPELLEES

In response to the direction of the Court, we respectfully submit herewith additional authorities and record reference on the two points, upon which the Court desires further argument.

POINT I.

DOES THE MATTER IN CONTROVERSY IN THIS CASE EXCEED THE SUM OR VALUE OF THREE THOUSAND DOLLARS?

In addition to the authorities referred to in our original brief on the above point, we beg leave to submit to the court the following additional authorities:

American Fertilizing Co. v. Board of Agriculture, (C. C. N. C. 1890) 43 Fed. 609;

Gallardo v. Questell (C. C. A. Porto Rico 1928) 29 Fed (2d) 897;

St. Louis S. W. Ry. Co. v. Emerson, 30 Fed (2d) 322, (C. C. A. 7th).

Station WBT v. Poulnot, 46 Fed. (2d) 671 (D.C. E. D. S. C.)

Swan Island Club v. Ansell, 51 Fed. (2d) 337 (C. C. A. 4th)

Hughes Federal Practice Vol. 1 Section 465-474.

POINT III.

IS THERE EQUITY UPON THE FACE OF THE BILL?

(c) Section 304 of Hemingway's Annotated Mississippi Code 1927 (now Section 420, Mississippi Code 1930) creates a substantive right enforceable in the courts of the United States. (See original brief of appellees, pages 36 to 44.)

On the argument of this case, our attention was called to a decision of this court to-wit: **Henrietta Mills v. Rutherford, County,** 281 U. S. 121, which counsel for both appelalnts and appellees had overlooked in preparing their briefs and arguments. Since the argument mentioned, we have with some care undertaken to examine the opinion of the court in the above mentioned case, and with all deference, submit

to the court the following features of that case which differentiate it from the case at Bar:

(1) The case is based upon the provisions of Section 723 of the Revised Statutes and Section 267 of the Judicial Code (U. S. C. A. Title 28, 384), providing in substance that a suit in equity shall not be sustained where a plain, adequate, and complete remedy may be had at law.

(2) The appellant in that case had the right to bring suit at law against the county under a statute of North Carolina and recover the taxes which might have been paid by him both to the state and county.

(3) The appellant likewise had the same right which would have been enforceable at law in the courts of the United States.

(4) It is true that said appellant also had the additional and cumulative remedy of injunction under the laws of the State of North Carolina, but this did not infringe upon or impair in any way the right of the action at law carefully described by this court.

In Mississippi, no right at law whatsoever exists. If the court be of the opinion that the remedy by way of mandamus is available, then, as demonstrated in the original brief, such right is not a remedy at law. If the court be of the opinion that there is no right of action whatsoever as contended by the State, then it is apparent that no remedy at law exists in Mississippi in favor of the appellees. For the court's convenience, we attach in the appendix hereto a copy of

Section 8270 of Hemingway's 1927 Code (3276 Code 1930) referred to at page 33 of the original brief. We direct the court's attention to the fact that the State construes this statute to mean that it is entirely discretionary, with the Auditor of Public Accounts and the Attorney General of the state, as to whether or not they will authorize a refund of taxes, and that there is no remedy in any court to enforce such authorization in the negative.

We therefore contend that the right to an injunction in equity granted by Section 304 of Hemingway's Code, **supra**, is a substantive right and not one of a mere remedial character. We further contend that, applying the prohibition contained in Section 723 of the Revised Statutes (267 of the Judicial Code,) it is apparent that this prohibition cannot prevail for the reason that this is a case where there exists no remedy at law whatsoever.

The opposing counsel seeks to escape the force of the foregoing argument on the ground that an adequate remedy at law is provided appellees by the decisions of the Supreme Court of the State of Mississippi, in that appellees had the right to proceed against the Tax Collector at law, for taxes sought to be enjoined in this case, in that event it should ultimately be determined under the peculiarly existant facts, that the tax imposed by Chapter 88 of the Laws of 1930 constituted a burden upon interstate commerce. This contention requires scrutiny.

We direct out attention to this question under two branches.

(1) Do the laws of the State of Mississippi pro-

vide any remedy at law as against the State for the recovery of the taxes in question?

(2) Do the laws of the State of Mississippi provide any remedy as against the Tax Collector, and if so, is that an adequate remedy, within the contemplation of the rule under discussion?

We have quoted as a part of the appendix to this Brief, **Section 8270 of the Code of 1927,** (now Section 3276 of the Code of 1930), which is the only statute affording any semblance of a remedy to the appellees.

The Court will observe from an examination of the Statute in question that the remedy afforded from the terms of the Statute itself is dependent upon, first, the willingness of the Auditor of Public Accounts to audit any claim asserted for the recovery of taxes, said to have been illegally collected, **secondly,** upon the will, whim or caprice of the Attorney General to approve or disapprove the claim so propounded; thirdly, upon the action of the legislature to make an appropriation in favor of the appellees, should they be successful in obtaining favorable action upon the part of the Auditor and Attorney General. The last statement is demonstrated conclusively by the concluding clause of Statute in question, which provides as follows:

> "Provided further that nothing in this section shall be construed as authorizing a refunding of state taxes paid into the State Treasury, through error or otherwise, without an appropriation first being made to pay such refund or refunds."

We submit that it is apparent from the reading of the Statute itself that the Auditor and Attorney Gen-

eral are without power to either refuse or approve a refund of taxes, "without an appropriation first being made to pay such refund or refunds."

The Supreme Court of Mississippi has definitely decided that the Statute quoted creates no right of action whatsoever as against the State.

We refer to the case of

National Life & Accident Insurance Company vs. State (decided February 16, 1931), 132 So. (Miss) 549.

In that case the appellant Insurance Company sought the recovery of privilege taxes, which had been admittedly wrongfully collected from it. In accordance with the Statute mentioned, it propounded its claim to the Auditor. The Attorney General failed to approve or disapprove the claim as propounded. Suit was instituted and the State interposed its demurrer on, upon other grounds, that the Statute to which we have referred, does not authorize suit against the State, even though it be admitted that the taxes sought to be recovered had been wrongfully collected and paid into the State Treasury. We quote the concluding sentence of the opinion of the Court, after a review of the authorities of our State.

> "That there has been no way provided by which these tax payers may sue the State, seems to be deliberate on the part of the legislature."

Therefore, it is apparent and at least conceded by acquiescence on the part of the Attorney General, that no action of any sort at law or otherwise is available

to the appellees for the recovery of the tax in controversy.

It is strenuously contended, however, on the authority of certain decisions of the Supreme Court of the State of Mississippi that a remedy at law is provided by the decisions of that Court for the recovery of the tax in question from the collector himself. The decisions relied upon are the following:

Coulson vs. Harris, 43 Miss. 728;

Tuttle vs. Everett, 51 Miss. 27;

Vicksburg vs. Butler, 56 Miss. 72;

Richardson vs. Scott, 47 Miss. 236.

We ask the Court to consider the following distinguishable features of the cases cited.

Coulson vs. Harris, supra, (decided in May 1871), simply adopted the rule now obtaining in this Court that the simple illegality of the tax creates no equity in and of itself. Without legislative action conferring jurisdiction in the Courts of Equity.

Tuttle vs. Everett, supra, adopts the rule that an acton will lie at law as against a tax collector, while the taxes collected remain in his hands and provided that the taxes colected are collected for a County or other local Corporation.

Vicksburg vs. Butler, supra, announces the rule that a municipality in Mississippi is subject to an action at law for taxes collected by its tax collector and paid

over to the municipality, which taxes were wrongfully collected.

Richardson vs. Scott, supra, announces the doctrine that there might exist equities prior to the Statute heretofore referred to, which would authorize the prosecution of a suit in equity to enjoin the colection of taxes.

The following features should be carefully noted by the Court, which distinguish the cases cited from the case at bar.

(1) All are cases relative to the collection of taxes on behalf of a municipal sub-division of the State, (by Mississippi statute such municipalites are made subject to any suit at law.

(2) The only case approving a right of action in the tax payer as against the tax collector was one in which the tax collector was acting on behalf of a County, the right of action so approved was expressly limited to those cases where the tax collected was for the benefit of a County or other local corporations. Such right of action was likewise limited to such time as the taxes might **remain in the hands of the tax collector.**

(3) All of the cases relied upon were decided prior to the adoption of the Code of 1880, which provided in so many words, the equitable remedy of injunction.

We respectfully submit that an action under the presence status of the laws of Mississippi will not lie against the tax collector for the recovery of taxes.

The exclusive remedy is provided by Section 8270 of Hemingway's Code of 1927, (Section 3276 of the Code of 1930), which is a section empowering the State Auditor and Attorney General to approve claims for taxes said to have been illegally collected.

The Court will observe that **Section 3289 of the Code of 1930,** quoted in the appendix, requires the tax collector to pay over all taxes to the State Treasurer on or before the 20th day of the months succeeding that in which colected. The taxes in question were required to be paid on September 30, 1930, and the tax collector was under the duty, or at least had the power, had they been paid by appellees, to pay the taxes into the State Treasury, on October 1st, next thereafter. Had the tax collector failed to pay the taxes received by him within the time stated above, he would have subjected himself to a liability for damages at the rate of 30 per cent (see Section 3290 of the Code of 1930, made a part of the appendix.)

It, therefore, is perfectly reasonable to say that under the present state of the statutes of Mississippi, a tax payer would be denied an action against the tax collector for the reason that to adopt the contrary rule, the courts would subject the tax collector of the State to liability for taxes collected, even though the collection thereof were commanded by statute, and then would leave him remediless as against the State for reimbursement. Such a holding would necessarily impede, retard, if not destroy the orderly collection of taxes.

The Court will likewise observe that under and by virtue of **Section 3276 of the Code of 1930,** it is immaterial whether a tax paid to the tax collector is

refund thereof by the legislature was not necessary.

We have, therefore, undertaken to demonstrate that the right of injunction granted by **Section 420 of the Mississippi Code of 1930**, being Section 304, Code of 1927, creates a substantive right enforceable in the Courts of the United States, in contradistinction to a pure and simple remedial right in the Courts of the State of Mississippi. We have undertaken to demonstrate that the right thus created by statute was created by the legislature with full knowledge and realization that there was no plain, full or adequate remedy at law, under the laws of the State, in favor of tax payers, against whom an unlawful or unconstitutional tax had been levied.

Therefore, the remedy is and has never been since this enactment a cumulative remedy, but an exclusive remedy.

Apparently the distinction between the right **vel non** to sue the collecting officer in the differentiation between the collection of a tax valid on its face and where its illegality is manifest. This Court has so held.

Erskine vs. Hohnback, 14 Wall 613

Haffin vs. Mason, 15 Wall. 671

Stutsman County vs. Wallace, 142 U. S. 293.

In **Stutsman County vs. Wallace**, supra, it was held by this Court that a tax collector is not liable, when he enforced a tax against property of a class, which is **prima** facie, taxable, but which by virtue of peculiar circumstances is exempt, which exemption is, and was not known to the tax collector.

It will be observed by the Court in the instant case that it is not contended that there are not certain classes of Cotton Buyers in the State of Mississippi, who are liable for the Privilege Tax. By virtue of the course of business of appellees, i. e., engaging in interstate commerce, the tax though lawful on its face is invalid or void as it may be applied to these appellees. Therefore, it follows, that if and in the event the tax collectors, appellants herein, should enforce the tax against appellees and exact the same from them, as provided by **Chapter 88 of the Laws of 1930,** appellees would be remediless in an action at law to recover the tax from the taxing authorities charged with the duty of collecting the privilege tax.

As further demonstrative of the inadequacy of a remedy at law, we desire to point out to the Court, the following excerpts from the admitted facts, in existence at the time of the filing of the bill and the application for the injunction:

(a) The officers charged with the duty of enforcing the provisions of the act in question were threatening each of the appellees with separate suits to enforce payment of the tax and penalties.

(b) Threatening appellees with criminal prosecution for failure to pay said tax and procure said license.

(c) Threatening issuance of warrants of distress upon and the seizure of the real and personal property of appellees.

(d) Threatening the arrest of each of appellees for

failure to procure the license provided by said act.

(Record Page 11)

Such action on the part of said officers would seriously impair, if not destroy the business of appellees, which impairment would cause the loss to appellees of their connections in the terminal markets.

Appellees had entered into contracts then outstanding with their connections and customers and were at the time of the filing of the bill deterred from purchasing cotton in performance of the contracts and the continuance of their business.

(Record 15-16)

It is submitted that the above facts are quite similar to, if not substantially identical, with the facts stated in the decision of this Court in

Rast vs. Van Deman & Lewis Co. 240 U. S. 342.

The above cause involved a statute of the State of Florida imposing a privilege tax on merchants issuing coupons or profit sharing certificates, or certificates of like character. The suit was instituted by a number of merchants in Florida, suing in behalf of themselves and others similarly situated, seeking to enjoin the enforcement of the statute insofar as it imposed a license tax on each of said merchants, as violative of the equal protective clause of the Fourteenth Amendment to the Constitution of the United States.

A motion to dismiss was filed by the Attorney General of Florida on, among other grounds, the following:

(a) Complainants had a complete and absolute remedy at law.

Van Deman & Lewis Company vs. Rast, 214 Fed. 827.

The District Court in disposing of this ground of the motion to dismiss, stated as follows:

> "The second, fourth, and fifth grounds of the motion may be disposed of together. The bill alleges a large number of persons interested, their liability to have their property seized, their business destroyed by such seizures and arrest, their customers lost and deprived of their avocations. Ordinarily the seizure of personal property will not be enjoined by a court of equity, but in the instant case under the allegations of the bill of complaint that such seizures and arrests, on account of the peculiar uses and character of the property, whereby they maintain their business and occupations, their losses would be impossible of ascertainment and computation, and thus they have no adequate remedy at law, and brings this case within the exception recognized by all the courts.

And it is on the theory that complainants in the cases had a complete, adequate, and sufficient remedy at law that the Supreme Court of Florida rendered the decision cited by the Attorney General in **Odlin V. Woodruff, 31 Fla. 160, 12 South. 227, 22, L.R.A. 669,** wherein they cite with approval the case of **Baldwin V. Tucker, 16 Fla. 258,** wherein the court says:

> "Courts of chancery have uniformly refused to grant an injunction to restrain * * * a mere tres-

pass, except in rare cases, where the mischief would be irreparable by reason of some extraordinary value or quality of the things endangered."

The Supreme Court of the United States, in the case of **Boise Hot & Cold Water Co. vs. Boise City, 213 U. S. 276, 29 Sup. Ct. 426, 53 L. Ed. 796**, say:

"Equity will not interpose where there is a remedy at law which is as complete, practicable, and adequate as equity could afford * * * Injunctions should not issue against the enforcement of the tax merely because it is unconstitutional or illegal, unless other circumstances bring the case within some clear ground of equity jurisdiction. Even though some states may, for convenience of remedy, permit equity to enjoin the collection of a tax for mere illegality, courts of a different and paramount sovereignty should not do so, and federal courts should not interfere by injunction with the fiscal arrangements of a state, if the rights involved can be preserved in any other manner."

"The showing made by the bill of complaint that these complaintants have large stock of goods and merchandise subject to the very drastic exactions of this section of the statute, that they are under contract for the sale of such merchandise, and that the seizure of their stocks, and arrests, as threatened, will cause the loss of trade and customers, interrupt their business and occupations, cause the sacrifice of stock seized, and subject them to heavy fines, etc., in our opinion make such case of irreparable damage to property and property rights as is properly cognizable in equity,

and falls squarely within the rules laid down by the Supreme Court above quoted."

This Court, in passing upon the question of whether or not the Bill of Complaint set forth grounds of equitable relief, concurred in the view of the Three Judge District Court, above set forth, reversing the cause, however, on its merits.

It is submitted that the admitted facts in the record in the instant cause bring this case squarely within the ruling of the above cause.

See also:

Grand Union Tea Company vs. Evans, 216 Fed 791

wherein, the same rule was followed.

Another case peculiarly like the facts in the instant case is

Little vs. Tanner, 208 Fed. 605

affirmed by this Court in

Tanner vs. Little, 240 U. S. 369

as to jurisdiction, but as in the **Rast Case**, reversed the cause on its merits, the Court holding that the **Rast Case** and the facts in the **Tanner** case involved a statute of like import.

In the **Tanner case** there was a license fee of $6,000.00 imposed on merchants using and dealing in stamps or coupons similar to the coupons in the **Rast case.**

Equity jurisdiction was invoked, "to avoid a multiplicity of suits and to prevent irreparable loss and injury to the business and property of the plaintiffs." In retaining jurisdiction the Court at page 609 of 208 Federal, stated:

> "The remaining grounds of the motion to dismiss, namely, that the bill does not state facts sufficient to entitle the plaintiffs to the relief sought, and that they have a plain, speedy, and adequate remedy at law, may be considered together. It is no doubt true as a general rule that a court of equity has no jurisdiction to enjoin criminal proceedings; but there are well-recognized exceptions to that rule. As said by the court in Dobbins vs. Los Angeles, 95 U. S. 223, 241,
>
> > "It is well settled that, where property rights will be destroyed, unlawful interference by criminal proceedings under a void law or ordinance may be reached and controlled by a decree of a court of equity."

See, also, Ex parte Young, supra.

We are of the opinion that this case falls within the exception to the general rule. While in form this is a suit to enjoin the enforcement of a criminal statute, it is in legal effect a suit to enjoin the exaction of an illegal licence fee or the imposition of an illegal tax. And:

> "It would seem that, if there were jurisdiction in a court of equity to enjoin the invasion of property rights through the instrumentality of an unconstitutional law, that jurisdiction

would not be ousted by the fact that the state had chosen to assert its power to enforce such law by indictment or other criminal proceedings." Davis & Farnum Mfg. Co. v. Los Angeles, 189.

When we consider the real object of this suit, the vast numbers affected by it, the severity of the penalties imposed, the unauthorized interference with legitimate business methods, and that goods now in original packages containing stamps and other devices are rendered practically valueless, the case seems to call peculiarly for the intervention of a court of equity. The motion to quash and the motion to dismiss are accordingly overruled."

In addition to the facts stated in the opinion of the Court in the above cause, the following facts are shown to exist in the case at bar.

(1) The suit instituted in behalf of the plaintiffs below and some three hundred other Cotton Buyers similarly situated.

(2) A like tax has been imposed by the Board of Levee Commissioners for the Yazoo-Mississippi Delta, a political sub-division of the State of Mississippi, authorized to levy privilege taxes for privileges exercised within said levee district.

(3) A like tax in the amount of 50 per cent thereof has been imposed by the municipality of the City of Clarksdale, for privileges exercised within the corporate limits of said municipality.

(4) The State, the Levee District and the City of Clarksdale, each will institute separate and distinct suits against each of appellees, for the collection of the tax and penalties, as well as institute criminal proceedings against each of the plaintiffs and the class on behalf of which appellees instituted this cause of action.

(Record Pages 12-13)

It, therefore, appears that the whole question of law and fact involved when determined will settle the rights of each belonging to the class of plaintiffs and the right not only of the State of Mississippi, but also the right of the Board of Levee Commissioners for the Yazoo-Mississippi Delta and City of Clarksdale, and therefore, a single determination by this Court will be determinative of innumerable civil suits as well as criminal prosecutions.

(Record 13-14)

Therefore, it is submitted that not only does the records show admitted facts of irremediable damage to plaintiffs, but shows that equitable jurisdiction is vested in the Courts to avoid a multiplicity of suits.

A discussion of this question may be found in the recent case of

Gramling vs. Maxwell, 53 Fed. (2d) 256, (decided August 19, 1931.)

The above cause was presented to the District Court of the Western Division of North Carolina, three judges sitting, seeking an injunction to restrain a privilege tax in the amount of $50.00 on peddlers of fruits and vegetables. The suit was filed by the plain-

tiff in behalf of himself and others similarly situated, alleging that approximately 400 other persons were in the same plight and condition that he was. The tax was attcked on the ground that the tax violated the commerce clause of the constitution.

In that case, it was shown that a statute of North Carolina authorized:

> "Payment under protest of a contraverted tax and suit first recovered, with a provision that interest may be recovered as well as principal, and that in the case of recovery of a judgment for taxes paid the State, the same shall be refunded by the State."

We take the liberty of quoting at length from the decision in the above cause.

> "The statute provides a remedy available in the federal courts as well as in the courts of the state; and the rights of a taxpayer to recover thereunder has been inferentially recognized by the Supreme Court of the state in entertaining an action instituted thereunder and deciding the case presented on the merits. Great Atlantic & Pacific Tea Co. vs. Maxwell, 199, N. C. 433, 154 S. E. 838. The statute is free of ambiguity and the rights of the taxpayer are clear. There is no such uncertainty, therefore, as confronted the taxpayer in Atlantic C. L. R. Co. v. Doughton, 262 U. S. 413,43 S. Ct. 620, 67 L. Ed. 1051, and Union Pac. R. Co. v. Board of Com'rs of Weld County, 247 U. S. 282, 38 S. Ct. 510, 62 L. Ed. 1110; and, if the case involved only the rights of a single taxpayer and the question were not presented as to

paid under protest or not, in order to authorize the tax payer's application for a refund thereof.

Certainly, therefore, it was not in contemplation of the legislature, that if and in the event a tax levied by the legislature should thereafter prove to be invalid or unlawful, that the tax collector, having paid the tax as provided by law into the Treasury of the State, should be held personally liable for the refund of the taxes to the tax payer, over a period of years.

The Supreme Court of the State of Mississippi in the case of

Blodgett vs. Pearl River County, 134 Miss. 816,

specifically held that a tax payer was not barred from propounding his claim for refund of taxes, until the expiration of six years from and after the date of the payment thereof. It will also be carefully noted that all of the cases relied upon by the Attorney General were decided prior to the enactment of the Code of 1880, which first created the equitable remedy by injunction.

The other cases cited by counsel decided by the Supreme Court of the State of Mississippi, after the Code of 1880 was adopted, deal with the right of appeal from ad valorem taxes and assessment, wherein a specific right of appeal from any assessment challenged by the tax payer is granted; this being a complete remedy granted by the Statute to remedy or redress the wrong complained of, therefore, has no application to the challenge of any privilege tax, imposed by the specific terms of an act of the legislature, as is the tax in question here.

The case of **Taylor vs. Guy, 119 Miss. 357**, cited by appellants to the effect that moneys may be refunded to the tax collector, without an appropriation by the legislature is wholly without application in the case at bar. The statute under consideration by the Supreme Court in that cause provides as follows:

> "Where any sheriff or tax collector has, or shall hereafter, by mistake or oversight, erroneously pay into the state treasury any moneys on account of ad valorem or privilege taxes, such officer may make application to the auditor for repayment of such taxes, and the auditor and attorney general shall thoroughly investigate such claim, and if found to be due the attorney-general shall so certify the auditor, who shall draw his warrant in favor of such sheriff, to be paid out of same fund in which it was erroneously paid into the State."

(Section 3278 of the Code of 1930)

In the above cause an application for refund under the provisions of the above statute was made by a Sheriff for moneys paid "by mistake or oversight" into the State Treasury, which application was audited by the Auditor of Public Accounts and approved by the Attorney General, and a warrant pursuant to said suit was issued on the Treasurer of the State, and the Treasurer of the State undertook to decline to pay the same. The only force and effect of the decision was that the warrant covered moneys paid by mistake or oversight by the Sheriff, therefore, was not a part of the funds of the State of Mississippi, nor did the State of Mississippi have color of title thereto, and that, therefore, an appropriation for the

the inability of the taxpayer to pay the tax, we should feel constrained to hold that the remedy, at law thus provided was adequate and that suit for injunction would not lie, Henrietta Mills v. Rutherford County, 281 U. S. 121, 50 S. Ct. 270, 74 L. Ed. 737; Singer Sewing Machine Co. v. Benedict, 229, U. S. 481, 33 S. Ct. 942, 57 L. Ed. 1288; Southern Ry. Co. v. Query (D. C.) 21 F. (2d) 333.

The case is not one, however, involving merely the right of a single taxpayer. It is a class suit instituted in behalf of a large number of peach growers affected by the statute; and we thing that it may be maintained in equity for the purpose of avoiding the multiplicity of suits which would otherwise result. Whatever may have been the rule formerly as to the right to maintain a class of this character in the federal courts, we think that, since the adoption of the 28th Equity Rule (28 USCA Sec. 723), the right to maintain such a suit cannot be denied. Little v. Tanner (D. C.) 208 F. 605; Everglades Drainage League v. Brownard (D. C.) 253 F. 246, 252; Risley v. City of Utica (C. C.) 173 F. 502, 506. And, if such suit may be maintained, there can be no question but that it is speedier, more efficacious, and more satisfactory for all parties concerned than the institution of a hundred or more actions at law for the recovery of taxes paid under protest. The remedy provided by the statute cannot, therefore, in view of the situation be deemed an adequate remedy as compared with the suit in equity which eliminates so much useless and cumbersome litigation. While the federal courts should be slow to exercise their injunctive power against the colection of taxes by the state where any other method of relief is open to the taxpayer (see

State R. R. Tax Cases, 92 U. S. 575, 23 L. Ed. 663), there is no reason why they should not exercise it in a case such as this, where the taxing statute is clearly and unmistakbly unconstitutionl and where the refusal to grant the injunction will necessarily result in a multiplicity of suits and great burden and expense to the parties.

"It is well settled that for the purpose of avoiding a multiplicity of suits equity will enjoin the enforcement of an unconstitutional taxng statute. Dows v. Chcago, 11 Wall, 108, 20 L. Ed. 65; Cummings v. Merchants National Bank, 101 U. S. 153, 25 L. Ed. 903; Ogden City v. Armstrong 168 U. S. 224, 18 S. Ct. 98, 103, 42 L. Ed. 144; Raymond v. Chicago Union Traction Co., 207 U. S. 20, 28 S. Ct. 7, 52 L. Ed. 78, 12 Ann Cas. 757; U. S. v. Board of Com'rs of Osage County, 251 U. S. 128, 40 S. Ct. 100, 64 L. Ed. 184. The only question is whether the prevention of such multiplicity as would result from members of a class paying an unconstitutional tax and bring suits for recovery thereof comes within the rule and justifies the awarding of an injunction in a suit brought in behalf of the members of the class. We think that it does. While there is authority to the contrary (see Cutting v. Gilbert, Fed. Cas. No. 3519; Youngblood v. Sexton, 32 Mich. 406, 20 Am. Rep. 654), reason and the overwhelming weight of authority sustain this jurisdiction in equity.

In Ogden City v. Armstrong, supra, a suit was filed by certain property owners in behalf of themeselves and others similarly situated to restrain the officials of a city from selling real estate

in satisfaction of paving assessments. One of the objections to jurisdiction was that plaintiffs should have sought relef at law and not in equity. After pointing out that the remedy by certiorari was not adequate, the court went on to say: "Not only, however, was there a want of an adequate remedy in proceeding by a writ of certiorari, but we think equitable jurisdiction was properly invoked to prevent a multiplicity of suits, and also to relieve the plaintiffs from a cloud upon their title."

In Little v. Tanner (D. C.) 208 F. 605, 609, a number of persons joined in a bill seeking an injunction against the enforcement of a taxing statute of the state of Washington. Motion was made to quash the bill on a number of grounds including misjoiner of parties and causes of action and that complaintants had an adequate remedy at law. The joinder was sustained under Equity Rule 38; and on the point that there was an adequate remedy at law the court, speaking through the late Judge Rudkin, used language which is peculiarly appropriate to the facts here. Said he: "When we consider the real object of this suit, the vast numbers affected by it, the severity of the penalties imposed, the unauthorized interference with legitimate business methods, and that goods now in original packages containing stamps and other devices are rendered practically valueless(the case seems to call peculiarly for the intervention of a court of equity. The motion to quash and the motion to dismiss are accordingly overruled." The Supreme Court reversed the decision of the lower court on the merits, but concurred with it on the question of jurisdiction.

Taner v. Little,n 240 U. S. 369, 380, 36 S. Ct. 379, 60 L. Ed. 691.

The rule supported by the weight of authority is well stated by the Supreme Court of Missouri in Ranney v. Bader, 67 Mo. 476 , as follows: "Equity will maintain jurisdiction to prevent multiplicity of suits, and no stronger case could be put for entertaining jurisdiction under this rule, than is presented, when one taxpayer for himself and all other taxpayers of a township or county, similarly interested, brings his bill, asking the chancellor to put forth restraining process to prevent the imposition and collection of an unauthorized tax, and thus settle in one suit, what it would take hundreds, and, perhaps, thousands to do, if such relief were denied, and the parties subjected to the payment of such tax were driven, each one, to his action at law for redress."

In Chicago v. Collins, 175 Ill. 445, 51 N. E. 907, 909, 49 L. R. A. 408, 67 Am. St. Rep. 224, suit was brought by 373 complainants, in behalf of themselves and others similarly situated, to enjoin the enforcement of an ordinance imposing a license fee on vehicles. It was objected that there was an adequate remedy at law by paying the fee and suing to recover it. In sustaining the jurisdiction in equity, the court said: "No inflexible rule can be laid down for the determination of the question as to whether jurisdiction exists in a court of equity. In general, an adequate legal remedy will suffice to make such courts hesitate in acting. But inadequacy in granting relief for the determination of a right may arise from causes other than mere forms of remedy, and it will

not do to sacrifice justice on the mere ground of the form of the remedy, where convincing facts show that adequate relief can best be had in the forum of a court of equity. In this case 373 complainants present facts showing that between 200,000 and 300,000 citizens and taxpayers are affected by the provisions of the ordinance, and, if compelled to pay the illegal tax, hardship and injustice will result to an enormous number of persons. If they pay the tax, and are compelled to resort to a court of law to recover back the amount so paid, the business of the courts will be obstructed by the number of actions of the same character. Long delay will ensue, and the costs to the persons so paying such illegal tax or license fee will be greater than the amount to be recovered. Under any circumstance, if the license exacted is illegal, it would amount to oppression and injustice to a large part of the population of city of Chicago, and this bill presents a case for the jurisdiction of a court of equity."

In Carlton V. Newman, 77 Me. 408, 1 A 194, 195, involving the right to maintain a class suit to enjoin the enforcement of a school district tax, the court, while holding to its general rule as to the adequacy of a legal remedy, said: "But we are of the opinion that when it appears that an entire school district tax is illegal, because assessed without authority of law, a bill to enjoin its collecton, brought by all of the taxpayers of the district, jointly, on whose polls and estates the tax has been assessed, or by any number thereof on behalf of themselves and all the others similarly situated, may be sustained upon the ground of inherent jurisdiction of equity to interpose for

the purpose of preventing a multiplicity of suits; that although each taxpayer has some legal remedy, it is grossly inadequate when compared with the comprehensive and complete relief afforded by a single decree." And see Fairley v. Duluth, 150 Minn. 374, 185, N. W. 390, 32 A. L. R. 1258; Williams v. County Court, 26 W. Va. 488, 53 Am. Rep. 94; Missouri K. & T. R. Co. v. Shannon, 100 Tex. 379, 100 S. W. 138, 10 L. R. A. (N. S.) 681; Sherman v. Benford, 10 R. I. 559; Bull v. Read, 13 Grat. (Va.) 78; Glenn v. Waddel, 23 Ohio St. 605; Little Rock v. Prather, 46 Ark. 471; Wilkie v. Chicago, 188 Ill. 444, 58 N. E. 1004, 80 Am. St. Rep. 182; Hewin v. Atlanta, 121 Ga. 723, 49 S. E. 765, 67 L. R. A. 795, 2 Ann. Cas. 296; 26 R. C. L. 461, 462; note 22 L. R. A. 703; note 32 A. L. R. 1266 et. seq.; Pomeroy's Equity Jurisprudence (4th Ed.) Vol. 1, Sec. 260 and notes.

Professor Pomeroy, in his Equity Jurisprudence (4th Ed.) Vol. 1, p. 450, et seq., thus states his conclusions with respect to the rule and the authorities sustaining it: "In a large number of the states the rule has been settled in well-considered and often repeated adjudications by courts of the highest character for ability and learning, that a suit in equity will be sustained when brought by any number of taxpayers joined as co-plaintiffs, or by one taxpayer suing on behalf of himself and all others similarly situated, or sometimes even by a single taxpayer suing on his own account, to enjoin the enforcement and collection, and to set aside and annul, any and every kind of tax or assessment laid by county, town, or city authorities, either for general or special purposes, whether it be entirely personal in its nature and liability, of whether it be made a lien on the prop-

erty of each taxpayer, whenever such tax is illegal. * * * * In the face of every sort of objection urged against a judicial interference with the governmental and executive function of taxation, these courts have uniformly held that the legal remedy of the individual taxpayer against an illegal tax, either by action for damages or perhaps by certiorari, was wholly inadequate; and that to restrict him to such imperfect remedy would, in most instances be a substantial denial of justice, which conclusion is, in my opinion, unquestionably true. The courts have therefore sustained these equitable suits, and have granted the relief and have uniformly placed their decision upon the inherent jurisdiction of equity to interfere for the prevention of a multiplicity of suits. The result has demonstrated the fact that complete and final relief may be given to an entire community by means of one judicial decree, which would otherwise require an indefinite amount of separate litigation by indivduals, even if it were attainable by any means. In several of the states there is a long series of these cases, extending through a considerable period of time, and it may well happen that in the earliest decisions of such a series the court has stated the reasons for its judgment at large, and has expressly announced the principle of preventing multiplicity of suits as the ground of its jurisdiction, while in the succeedng ones the judges have not thought it necessary to repeat the reasons and ground which had already been fully explained. It is plain that the latter cases, no less than the former ones, are an authority for the doctrine under examination. In all these suits by lot-owners to be relieved from a local assessment, by tax payers to be relieved

from a tax or burden of public debt, there is no pretense of any privity, or existing legal relation, or common property or other right, among the plaintiffs individually, or between them as a body and the defendant. There is no common right of the single adversary party against them all, as is found in the case of a parson against his parishioners for tithes, or of the lord of a manor against his tenants for a general fine, or for certain rights of common; nor is there any common right or interest among them against their single adversary. The only community among them is in the question at issue to be decided by the court; in the mere external fact that all their remedial rights arose at the same time, from the same wrongful act, are of the same kind, involved similar questions of fact, and depend upon the same question of law. This sort of community is sufficient, in the opinion of so many and so able courts, to authorize and require the exercise, under such circumstances, of the equitable jurisdiction, in order to prevent a multiplicity of suits."

It is, therefore, respectfully submitted that there is undoubted equity on the face of the bill and the admitted facts in the record and that the object of the bill sought, undoubtedly demonstrates that more than $3,000.00 is involved in the controversy.

Respectfully submitted,

EDWARD W. SMITH,

SAM C. COOK,

J. L. ROBERSON,

Attorneys for Appellees.

J. W. CUTRER,

Of counsel for Appellees.

CERTIFICATE OF COUNSEL

This is to certify that I have this day delivered to Honorable J. A. Lauderdale, Assistant Attorney General, a copy of the above and foregoing brief.

This the 6th day of January, A. D., 1932.

EDWARD W. SMITH,
Of counsel for Appellees.

CERTIFICATE

This is to certify that I have received a true copy of the above and foregoing brief.

This the 7th day of January, A. D., 1932.

J. A. LAUDERDALE,
Of counsel for Appellants.

APPENDIX

Excerpts Mississippi Annotated Code of 1930

SEC. 3276. TAXES ERRONEOUSLY PAID REFUNDED.—If any person, firm or corporation has paid or shall hereafter pay to the auditor of public accounts or to any tax collector, through error or otherwise whether paid under protest or not, any ad valorem, privilege or excise taxes for which such person, firm or corporation was not liable, or if any such taxpayer has paid any such tax in excess of the sum for which he or it was liable, and any such erroneous payment or overpayment has been paid into the proper treasury, then, in any such event, the auditor of public accounts is hereby authorized and required, upon proper application of any such claimant, to make a careful investigation of all such claims, or, if he shall find that any taxes or moneys have been, or may hereafter be, erroneously paid into the treasury of the state, county, or levee boards, for the purchase or redemption of lands erroneously sold for taxes heretofore or hereafter by any tax collector, he shall audit such claims against each separate fund in proportion to the amount paid over to such fund in each case, and he shall submit such audited claim with the voucher and evidence on which such claim is based, to the attorney-general for his inspection and approval, and if the attorney-general be of the opinion that such claims should be paid he shall approve the same, and the auditor shall thereupon file such voucher and other papers necessary in each case, in his office, as a voucher, and issue his warrant on the state treasury in favor of the claimant for the amount of purchase-

money or taxes erroneously paid into the state treasury, and the auditor shall audit the amount of taxes paid the county and levee boards, as the case may be, and shall certify the amounts found to be due to the clerk of the board of supervisors and secretary of the levee board, and the said board of supervisors or levee board, shall cause the warrant to be issued on the treasurer of the county, or levee board, in favor of the claimant as certified by the auditor of public accounts, as the case may be, and the county depository, or the treasurer of the levee board, is hereby directed, authorized and required to pay such claims; provided, that it shall not be necessary in order to authorize such refund that the tax payment was made under protest or because of coercive measures taken on the part of the collecting officers. Provided, however, that nothing in this section shall be so construed as to authorize the recovery or repayment of any tax heretofore levied and collected by any special road district, drainage district, or separate school district, on account of, or upon the ground that the law authorizing such tax was unconstitutional, whether the unconstitutionality of such tax be based upon the creation or mode of operation of any special road district, drainage district or separate school district. Provided further, that nothing in this secton shall be construed as authorizing the refunding of state taxes paid into the state treasury through error, or otherwise, without an appropriation first being made to pay such refund or refunds.

SEC. 3289. TAX COLLECTOR'S REPORT MONTHLY—Taxes Paid Over—The Tax Collector shall make reports, in writing, verified by his affidav-

it on the first day of each month, or within twenty days thereafter, except as hereinafter provided, to the auditor of public accounts and to the clerk of the board of supervisors, of all taxes collected by him during the preceding month for the state, levee and county respectively, and if he has collected none, the report shall be made out and state that fact, and he shall, at or within the same time, pay over all taxes collected to the state treasurer and county treasury, respectively.

SEC. 3290. FINAL REPORT AT END OF FISCAL YEAR—His final report and settlement with the auditor of public acounts and with the clerks of the board of supervisors for the taxes of any fiscal year shall be made on or within fifteen days after the first day of September of the same year. If a tax collector fail to make any report, or to pay over any taxes as above required, he shall pay damages of thirty per centum thereon, and interest on said amount of principal and damages at the rate of six per centum per annum for the time the same shall be due until paid. The auditor and clerk shall not omit in any case to charge the damage to the collector, when incurred, but the same shall be remitted on the certificate of the governor and attorney-general that they are satisfied that the delay has not been wilful or avoidable by the collector.

SUPREME COURT OF THE UNITED STATES.

No. 84.—October Term, 1931.

W. L. Matthews et al., Appellants, vs. J. F. Rodgers et al. } Appeal from the District Court of the United States for the Northern District of Mississippi.

[February 15, 1932.]

Mr. Justice Stone delivered the opinion of the Court.

This is an appeal, §§ 238, 266 of the Judicial Code, from a decree of a District Court of three judges, for the Northern District of Mississippi, enjoining the collection from the several appellees of a state tax, as an unconstitutional burden on interstate commerce. — F. (2d) —. After argument here on the merits, the cause was restored to the docket "for reargument, limited to the question of the jurisdiction of the District Court both with respect to the amount involved in the suit and the jurisdiction of the court as a court of equity"; reargument has been had accordingly.

The bill of complaint assails the constitutionality of § 56, c. 88, 1930 Laws of Mississippi, as applied to appellees. The section imposes an annual license or "privilege" tax of $100, payable in advance by "every person engaged in the business of buying or selling cotton for himself." It also requires employers engaged in the business of buying or selling cotton to pay a similar "tax of twenty-five dollars ($25.00) for every employe engaged in their business as buyer or seller." Penalties are imposed, in double the amount of the tax for its non-payment. § 225. Failure to make application for the license, or engaging in the business without having procured the license or paid the tax, are misdemeanors, punishable by fine not exceeding $500 or imprisonment not exceeding six months, or both. § 242.

The bill, which is in the form of a class bill, filed by the numerous appellees for the benefit of themselves and others similarly situated, alleges that they are engaged in interstate and foreign commerce,

in the course of which they purchase cotton within the state and sell and ship it in interstate or foreign commerce to purchasers outside the state; that the business of each of the several appellees and the right to conduct it is of a value of more than $3,000, the jurisdictional amount for suits brought in a district court of the United States; that the tax imposed by the state statute is, as to them, an unconstitutional burden on interstate commerce, and that appellants, state officers, charged with the duty of collecting the tax, threaten to enforce its collection by criminal proceedings and the imposition of penalties. The bill states that resort to equity to prevent collection of the tax is either necessary or authorized for the following, among other, reasons:

(1) That the enforcement of the unconstitutional statute would irreparably injure or destroy the business of each of the appellees.

(2) That the taxes, if paid, can not be recovered by any action or proceeding at law.

(3) That § 304 of Hemingway's Annotated Mississippi Code of 1927, has conferred on the appellees the right to proceed in equity in the State courts to enjoin the collection of an unconstitutional tax, and that that remedy is available in the Federal district court.

(4) That resort to equity is necessary in order to avoid a multiplicity of separate suits by the appellees and others similarly situated, three hundred in all, to enjoin collection of the tax, or otherwise necessary in order to recover it if paid or to prevent successive prosecutions for the violation of the Act, in all of which suits or proceedings the issue of the constitutionality of the tax would be substantially the same.

The right of appellees, if any, to maintain the present suit, is conferred by § 24 of the Judicial Code, 28 U. S. C. § 41 (1), which, regardless of the citizenship of the parties to the suit, vests in district courts of the United States jurisdiction over suits at law or in equity "arising under the Constitution or laws of the United States", where the matter in controversy exceeds $3,000. Although the present suit arises under the Constitution of the United States, see *Davis* v. *Wallace*, 257 U. S. 478, and it be assumed, without deciding, that the jurisdictional amount is involved, it cannot be maintained if not within the equity jurisdiction of the district court. The want of equity jurisdiction, if

obvious, may and should be objected to by the court of its own motion. In other cases, this jurisdictional requirement, unlike the others mentioned, may be treated as waived if the objection is not presented by the defendant *in limine*. *Duignan* v. *United States*, 274 U. S. 195, 199; *Singer Sewing Machine Co.* v. *Benedict*, 229 U. S. 481, 484; *Thompson* v. *Railroad Companies*, 6 Wall. 135; compare *Matson Navigation Co.* v. *United States*, — U. S. —, January 4, 1932; *Hilton* v. *Dickinson*, 108 U. S. 165, 168; *Grace* v. *American Central Insurance Company*, 109 U. S. 278, 283-284; *Börs* v. *Preston*, 111 U. S. 252, 255. Here, the objection to the equity jurisdiction of the district court was properly raised by appellants' motion to dismiss the bill, and is preserved by their assignments of error in this Court.

Section 16 of the Judiciary Act of 1789, 1 Stat. 82, perpetuated without material change as Rev. Stat. 723, 28 U. S. C. § 384, Jud. Code § 267, declares that suits in equity shall not be sustained in the courts of the United States "in any case where plain, adequate and complete remedy may be had at law." The effect of this section, which was but declaratory of the rule in equity, established long before its adoption, is to emphasize the rule and to forbid in terms recourse to the extraordinary remedies of equity where the right asserted may be fully protected at law. See *Deweese* v. *Reinhard*, 165 U. S. 386, 389; *New York Guaranty Co.* v. *Memphis Water Co.*, 107 U. S. 205, 214.

The reason for this guiding principle is of peculiar force in cases where the suit, like the present one, is brought to enjoin the collection of a state tax in courts of a different, though paramount sovereignty. The scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts, and a proper reluctance to interfere by injunction with their fiscal operations, require that such relief should be denied in every case where the asserted federal right may be preserved without it. Whenever the question has been presented, this Court has uniformly held that the mere illegality or unconstitutionality of a state or municipal tax is not in itself a ground for equitable relief in the courts of the United States. If the remedy at law is plain, adequate, and complete, the aggrieved party is left to that remedy in the state courts, from which the cause may be brought to this Court for review if any federal question be involved, Jud. Code § 237, or to his suit at law in the federal courts

if the essential elements of federal jurisdiction are present. See *Boise Artesian Hot and Cold Water Co.* v. *Boise City*, 213 U. S. 276; *Shelton* v. *Platt*, 139 U. S. 591; *Dows* v. *Chicago*, 11 Wall. 108, 110, 112.

It may be assumed that if appellees do not pay the challenged tax, and in consequence of that omission they are subjected, as it is alleged they will be, to the civil and criminal penalties for non-payment, the resulting injury to their business will be irreparable and can be avoided only by resort to equity to prevent the threatened wrong. But appellants insist that the appellees are under no such constraint, either to expose themselves to the penalties for failure to pay the tax, or to seek equitable relief against its collection, since each of them may pay the tax to the collecting officer under protest and, under the laws of Mississippi, may maintain a suit at law for its recovery on the ground that it was exacted in violation of the Constitution of the United States. That such a procedure saves to the taxpayer his federal right, and if available will defeat the jurisdiction of federal courts to enjoin the collection of the tax, has long been the settled rule in this Court. *Henrietta Mills* v. *Rutherford County*, 281 U. S. 121; *Arkansas Building & Loan Association* v. *Madden*, 175 U. S. 269; *Atchison, Topeka & Santa Fe Ry.* v. *O'Connor*, 223 U. S. 280; *Shelton* v. *Platt, supra; Singer Sewing Machine Co.* v. *Benedict, supra; Allen* v. *Pullman's Palace Car Co.*, 139 U. S. 658; *Indiana Manufacturing Co.* v. *Koehne*, 188 U. S. 681.

From an examination of the decisions of the highest court of the state we conclude, as the Attorney General of the State insists, that that procedure is open to the appellees in Mississippi, if the tax is paid under protest, to avoid penalties or criminal proceedings. In *Coulson* v. *Harris*, 43 Miss. 728, the Supreme Court of Mississippi denied the jurisdiction of equity to enjoin the collection of an illegally assessed tax on the sole ground that the taxpayer might pay the tax to the collecting officer and sue at law for its recovery. In *Tuttle* v. *Everett*, 51 Miss. 27, recovery was allowed of a tax thus paid, in a suit at law brought against the collector before he had paid over the tax to the proper treasury. In *City of Vicksburg* v. *Butler*, 56 Miss. 72, and *Pearl River County* v. *Lacy Lumber Co.*, 124 Miss. 85, suits at law for recovery of a tax, were maintained against the city, in the first case,

and the county, in the second, to which the collector had paid the taxes. But in the former the court was at pains to point out, pp. 75, 76:

"Some of the cases refer to a notice to the collector that suit will be brought to recover the money back. That notice is necessary, if the payer intends to sue the collector. After its receipt, if he pays it over to the proper treasury, he does so at his risk, and does not relieve himself from responsibility. If, however, he pays it over without such notice, suit can only be brought against his principal,—in this case the city of Vicksburg."

In *Pearl River County* v. *Lacy Lumber Co., supra,* the court said, p. 109:

"We do not think that the county can shield itself from repayment of money collected under an unconstitutional law, paid under protest, on the ground that the county had disbursed the money so collected into various taxing districts, or has expended the money which it wrongfully collected. The fact that the county might not be able to recover from the taxing districts the amount of money paid to such districts would not exempt it from liability to the taxpayer from whom it wrongfully collected it."

Such a suit, although against the collecting officer rather than the state or municipality, affords an adequate legal remedy, in the absence of allegations in the bill, which are wanting here, of special circumstances showing inability of the taxpayer to pay the tax or of the collecting officer to respond to the judgment: see *Arkansas Building & Loan Association* v. *Madden, supra,* p. 274; *Atchison, Topeka & Santa Fe Ry.* v. *O'Connor, supra,* p. 285; *Singer Sewing Machine Co.* v. *Benedict, supra,* p. 487; and is the rule in Mississippi: *Coulson* v. *Harris, supra,* p. 752; *Richardson* v. *Scott,* 47 Miss. 236.

Collection of the money by the collector in the name of the state, if wrongful, would not protect him. *Atchison, Topeka & Santa Fe Ry.* v. *O'Connor, supra.* The statutes, §§ 3289, 3290, Mississippi Code of 1930, which require payment over by the collector of taxes to the appropriate treasury, allow the penalties for non-payment to be remitted on certificate of the governor or attorney general "if they are satisfied that the delay has not been wilful or avoidable by the collector", and § 3278 makes provision for the repayment to any sheriff or tax collector of taxes "by mistake or oversight erroneously paid" to the state treasurer.

See *Taylor* v. *Guy*, 119 Miss. 357. These provisions would seem to contemplate suits against the collector for the recovery of the tax and to afford him some protection in the event of a judgment against him. *Atchison, Topeka & Santa Fe Ry.* v. *O'Connor, supra*, p. 287. But as no facts are presented to show that the suit against the collector in the present case will not be adequate, it is unnecessary to consider their precise scope and effect.

The suit in equity to enjoin an illegal tax, authorized by § 304 of Hemingway's Code for 1927 (§ 420, Mississippi Code of 1930), appears not to be available when there is any other adequate remedy. See *Anderson* v. *Ingersoll*, 62 Miss. 73; *Board of Supervisors* v. *Ames*, 3 So. 37. In any case, the section cannot affect the jurisdiction of federal courts of equity. The equity jurisdiction conferred on inferior courts of the United States by § 11 of the Judiciary Act of 1789, 1 Stat. 78, and continued by § 24 of the Judicial Code, is that of the English court of chancery at the time of the separation of the two countries. *Payne* v. *Hook*, 7 Wall. 425, 430; *In re Sawyer*, 124 U. S. 200, 209-210. While local statutes may create new rights, for the protection of which recourse may be had to the remedies afforded by federal courts of equity, if the remedy at law is inadequate and the other jurisdictional requirements are present, state legislation cannot enlarge their jurisdiction by the creation of new equitable remedies, nor can it avoid or dispense with the prohibition against the maintenance of any suit in equity in the federal courts, where the legal remedy is adequate. *Henrietta Mills* v. *Rutherford County, supra*, pp. 127, 128; *Pusey & Jones Co.* v. *Hanssen*, 261 U. S. 491, 500.

Appellees' bill of complaint does not state a case within the jurisdiction of equity to avoid multiplicity of suits. As to each appellee a single suit at law brought to recover the tax will determine its constitutionality and no facts are alleged showing that more than one suit will be necessary for that purpose. See *Boise Artesian Hot & Cold Water Co.* v. *Boise City*, 213 U. S. 276, 285-286; *Dalton Adding Machine Co.* v. *State Corporation Commission*, 236 U. S. 698, 700-701.

But it is said that since each appellee must pay the tax to avoid penalties and criminal prosecution, all must maintain suits for the recovery of the tax unconstitutionally exacted, in order to protect their federal rights, and that to avoid the necessity of the

many suits, equity may draw to itself the determination of the issue necessarily involved in all the suits at law.

In general, the jurisdiction of equity to avoid multiplicity of suits at law is restricted to cases where there would otherwise be some necessity for the maintenance of numerous suits between the same parties, involving the same issues of law or fact. It does not extend to cases where there are numerous parties plaintiff or defendant, and the issues between them and the adverse party are not necessarily identical. *St. Louis, Iron Mountain & Southern Ry. Co.* v. *McKnight*, 244 U. S. 368, 375; *Kelley* v. *Gill*, 245 U. S. 116, 120; *Francis* v. *Flinn*, 118 U. S. 385; *Scott* v. *Donald*, 165 U. S. 107, 115; *Hale* v. *Allinson*, 188 U. S. 56, 77 *et seq.*; and see Pomeroy, Equity Jurisprudence, (4th ed. 1918), §§ 251, 251½, 255, 259, 268.

While the present bill sets up that the single issue of constitutionality of the taxing statute is involved, the alleged unconstitutionality depends upon the application of the statute to each of the appellees, and its effect upon his business, which is alleged to be interstate commerce. The bill thus tenders separate issues of law and fact as to each appellee, the nature of his business and the manner and extent to which the tax imposes a burden on interstate commerce. The determination of these issues as to any one taxpayer would not determine them as to any other. There was thus a failure of such identity of parties and issues as would support the jurisdiction in equity.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.